Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

FRED CURTIS,

Petitioner,

v.

DONALD WAYNE GOOD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a wrongfully-convicted plaintiff's claim brought under 42 U.S.C. § 1983 that his due process rights were violated by a police officer's fabrication of evidence against him sounds in "substantive" or "procedural" due process.

(2) Whether a police officer is entitled to qualified immunity for an alleged violation of the Due Process Clause when an intervening judicial officer, appraised of all relevant facts, holds that the plaintiff's due process rights were not violated.

PARTIES TO THE PROCEEDING

Petitioner Fred Curtis, in his individual capacity, is a defendant in the district court and was the appellant in the collateral order doctrine appeal in the Fifth Circuit. The City of Irving, Texas, a municipal corporation, is also a defendant in the district court. Respondent Donald Wayne Good is the plaintiff in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fred Curtis, in his individual capacity, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-17a) is reported at 601 F.3d 393. The district court's opinion (App., *infra*, 18a-42a) is available at 2009 WL 804701.

JURISDICTION

The Fifth Circuit entered judgment on March 23, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * *.

STATEMENT

This Petition addresses important questions of federal law upon which the United States Circuit Courts of Appeal are split.

The Plaintiff/Respondent in this case, Donald Wayne Good, was arrested in 1983 and charged with, among other offenses, burglary of a habitation with intent to commit theft, rape and sexual abuse. His first trial in 1983 ended in a hung jury. The Respondent was retried in 1984 and was convicted. However, the Texas Court of Criminal Appeals reversed his conviction in 1986 based upon prosecutorial misconduct issues unrelated to his claims against Petitioner. *Good v. State*, 723 S.W.2d 734 (Tex. Crim. App. 1986). The Respondent was then tried for a third time in 1987, chose to represent himself *pro se*, and refused to put on any defense to the State's case. Instead, he continuously repeated the same oral request, asking the trial judge to permit another inmate to assist him in presenting his defense. The trial judge repeatedly denied said request and ultimately had Respondent bound and gagged due to his continued disruptions of the proceedings. The Respondent was convicted on September 16, 1987. However, the Texas Court of Criminal Appeals vacated his conviction in 2004 after post-conviction DNA testing, unavailable at the time of his three trials, excluded him as a contributor of the DNA evidence. *Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex.

Crim. App. Nov. 17, 2004). Because the Court's ruling was based upon new evidence, there was no finding of any trial error which required the reversal of his conviction. *Id.*

In 2006, Respondent brought suit in the United States District Court for the Northern District of Texas under 42 U.S.C. § 1983 alleging *inter alia*, that Petitioner, a City of Irving police officer, violated his Fourteenth Amendment due process rights when he intentionally darkened (i.e., underexposed) a Polaroid photograph he took of the Respondent in 1983 which was included in the photographic lineup that was presented to the victim in a preindictment identification procedure.[1] The Respondent alleged that this was done to match the victim's description of the perpetrator, who she described as appearing "tan." After the victim identified the Respondent in the photographic lineup, he was charged with the burglary. Subsequently, the victim and another witness (i.e., her young daughter) identified him in a live lineup and a voice lineup. Additionally, a suppression hearing was held prior to the Respondent's trial to determine, *inter alia*, the admissibility of testimony relating to his identification in the photographic lineup. The trial court, after hearing testimony, examining the lineup, and evaluating the identification procedures, held "beyond a reasonable doubt" that "said photographic lineup was not suggestive in its composition[.]" App. 44a.

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[1] The original photographic lineup no longer exists. While several poor-quality photocopies of the photographic lineup have been recovered from court records, they do not depict how the original photograph appeared

The Petitioner moved for summary judgment herein based upon qualified immunity. In its opinion and order dated March 26, 2009, the district court denied his motion in regard to the Respondent's Fourteenth Amendment claim. Specifically, the court held that if "an identification procedure is 'unnecessarily suggestive and conducive to irreparable mistaken identification,' it violates the individual's right to due process." App. 32a-33a (citing *United States v. Atkins*, 698 F.2d 711, 713 (5th Cir. 1983) (quoting *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967)). The district court denied summary judgment, having identified a fact question as to "whether the photographic lineup was unduly suggestive" based solely upon an affidavit provided by Respondent wherein he stated that he saw Petitioner darken his photograph in 1983. App. 33a.

In so holding, the district court recognized that the analysis of whether the Respondent's due process rights had been violated was governed by the two-part test espoused by this Court in *Stovall*, which was later refined in *Manson v. Brathwaite*, 432 U.S. 98 (1977). Specifically, for there to be a due process violation arising out of the use of a preindictment identification procedure, the Respondent's trial must have been impaired by the admission of a constitutionally deficient identification which was both "unnecessarily suggestive" and "conducive to irreparable mistaken identification." App. 32a-33a; *Brathwaite*, 432 U.S. at 112-14. While the district court addressed the first element of this test (i.e., it found a fact question existed as to the suggestiveness of the lineup), it did not address the reliability aspect, despite the Petitioner having placed in the record extensive summary judgment evidence in support of its

reliability (e.g., a sworn declaration from the victim detailing her viewing of the photographic lineup, its composition, and her identification of the Respondent).

Further, the district court did not directly rule upon the Petitioner's contention that he was entitled to qualified immunity because causation was lacking due to the intervening act of the trial judge ruling that the photographic lineup "was not suggestive in its composition[.]" *See* App. 32a-33a. In this regard, it only addressed the issue of whether the Respondent's argument that the photographic lineup was suggestive was barred by collateral estoppel. App. 33a.

Petitioner perfected an appeal under the collateral order doctrine to the Fifth Circuit. He argued that even if the Respondent's affidavit–which stated that he saw his darkened photo, not that the resulting photographic lineup was suggestive–created a fact issue as to the lineup's suggestiveness, the district court had failed to address the *Brathwaite* reliability factors to determine unreliability, without which, as the Seventh Circuit has recognized, no due process violation can occur. *See Alexander v. City of South Bend*, 433 F.3d 550, 555 (7th Cir. 2006). Alternatively, the Petitioner argued that he was entitled to qualified immunity even if the photographic lineup was both suggestive and unreliable due to the fact the trial court had unilaterally erred by admitting same into evidence and, as the Second Circuit has held, such an independent judicial error breaks the necessary causal chain to impose liability. *See Wray v. City of New York*, 490 F.3d 189 (2d Cir. 2007).

The Fifth Circuit rejected these arguments and authorities. Specifically, it unilaterally rejected the

application of *Brathwaite* in any claim brought under § 1983 in which a plaintiff alleges that an identification procedure was "intentionally designed to procure a false identification." App. 8a. In support of same, it cited two Ninth Circuit cases which are commonly understood to have recognized the existence of a substantive due process right not to be subjected to criminal charges based upon fabricated evidence, regardless of whether the use of said evidence caused the resulting trial of the accused to be unfair. The Fifth Circuit therefore recognized a substantive, rather than a procedural, due process claim relating to the fabrication of evidence. Further, it rejected the Petitioner's argument that he could not be held civilly liable because the causal chain of liability was broken due to the trial court's intervening holding that the actual appearance of the photographic lineup "was not suggestive in its composition[,]" as well as its subsequent admittance of same into evidence.

The Fifth Circuit's holding establishes that a police officer may be held civilly liable for the creation of false or fabricated evidence under the Due Process Clause of the Fourteenth Amendment even when no concrete harm depriving the accused of a fair trial results and, ostensibly, even when said evidence was not admitted, or referred to, at trial. *See Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc) (Tashima, J.). Further, a police officer would continue to be subjected to potential liability even after a trial judge had reviewed the evidence and found that it satisfied the appropriate constitutional analysis. The Fifth Circuit's decision not only creates a new federal due process right which has not heretofore been recognized by this Court, it also expands the scope of potential liability for police officers and other

government officials to encompass actions brought decades after the alleged wrongful act based only upon an allegation of malicious intent, even where a judicial determination of constitutionality has previously been made and remains unchallenged.

REASONS FOR GRANTING THE PETITION

This Court has recognized that qualified immunity provides officials with protection "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To overcome a public official's asserted defense of qualified immunity in the context of a summary judgment, a plaintiff must, *inter alia*, demonstrate that the facts he "has shown . . . make out a violation of a constitutional right." *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The decision below specifically held that allegations that a police officer knowingly fabricated evidence constitutes a freestanding violation of a plaintiff's due process rights. App. 8a. While not specifically identifying whether this conclusion was grounded in substantive or procedural due process, the Fifth Circuit relied upon the reasoning of the Ninth Circuit and its substantive due process analysis, implicitly adopting said reasoning. *See id.* (citing *Brewster v. Shasta County*, 27 Fed. App'x 908, 912-13 (9th Cir. 2001) (unpublished); *Devereaux*, 263 F.3d at 1075). However, the existence of such a substantive due process right has been rejected by several other circuits and is not found anywhere in this Court's

jurisprudence. As a result, the decision below widens a split amongst the circuits regarding whether such a plaintiff has shown a violation of his constitutional rights. *Saucier*, 533 U.S. at 201. Further, the uncertainty caused by this split in authority results in both plaintiffs and law enforcement officers being unsure of the parameters of a due process claim, which currently differs from circuit to circuit. Therefore, review of the Fifth Circuit's decision is warranted to resolve this ongoing split in authority and the uncertainty that results therefrom.

I.
The Questions Presented To This Court Deal With Important Questions Of Federal Law That Have Not Been, But Should Be, Settled By This Court

Each of the Questions Presented herein represents an important question of federal law which should be decided by this Court in the interest of providing certainty and consistency among the circuits in regard to the scope of immunity afforded to both state and federal law enforcement officials and clarifying when intervening judicial acts break the chain of civil causation in § 1983 litigation. *See* Sup. Ct. R. 10(c).

A. This Court Previously Recognized The Existence Of These Important Issues Of Federal Law In *Pottawattamie County v. McGhee*, But Was Deprived Of The Opportunity To Rule Upon Same When That Case Settled

Just last term, this Court heard arguments in *Pottawattamie County v. McGhee*, Docket No. 08-1065.

McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 933 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *cert. dismissed*, 130 S. Ct. 1047 (2010). While *McGhee* addressed claims alleging prosecutors fabricated evidence and used it to wrongfully convict the plaintiff (which possibly implicated absolute immunity), the issues of whether the fabrication of evidence itself violated the plaintiffs' constitutional rights and whether the defendants could be held liable for same were also squarely before the Court. Both the prosecutors and the United States, as amici, argued that it was the use of fabricated evidence at trial which could violate a defendant's *procedural* due process rights, but that the creation of fabricated evidence alone did not violate substantive due process. *See* Merits Brief of Petitioners, *Pottawattamie County v. McGhee* (No. 08-1065), pp. i, 26-28, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_Petitioner.pdf; Amicus Brief of the United States, *Pottawattamie County v. McGhee* (No. 08-1065), pp. 14-18, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_PetitionerAmCuUSA.pdf ("[c]ourts have never recognized a freestanding due process right against fabrication of evidence"). While the United States agreed that a police officer could be held liable for fabricating evidence, the government was clear that such liability was contingent upon the resulting "corruption of criminal proceedings." Amicus Brief of the United States in *McGhee*, p. 21. On the other hand, the respondents argued that "prosecutors and police violate the Due Process Clause by fabricating evidence to frame a person even where the intended victim neither pleads guilty nor is convicted at trial." Merits Brief of Respondents, *Pottawattamie County v. McGhee* (No. 08-1065), p. 24, *available at* http://www.abanet.

org/publiced/preview/briefs/pdfs/07-08/08-1065_Respondent.pdf.

This identical question of whether the fabrication of evidence implicates substantive or procedural due process is presented herein. Further, while *McGhee* did not directly address the issue of a break in the causal chain, as is presented herein, it did address the corresponding question of the appropriate causation standard necessary to impose liability for such a claim. *See* Merits Brief of Petitioners in *McGhee*, pp. 29-33; Amicus Brief of the United States in *McGhee*, pp. 18-20; App. 11a-12a. These issues remain unanswered.

B. The Appropriate Analysis To Be Employed By Courts Reviewing Such Due Process Claims Depends Upon Their Substantive Or Procedural Nature

The Due Process Clause is the source of three constitutional protections: (1) the application of certain portions of the Bill of Rights to the states, (2) substantive due process protections, and (3) procedural due process protections guaranteeing that a defendant receives a fair trial. *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring). "[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right[.]" *Daniels*, 474 U.S. at 330. If a plaintiff's claim alleging the knowing fabrication of evidence in and of itself offends substantive due process, then that constitutional violation has caused a complete harm and is actionable without regard to the effect, if any, said fabrication

had on the resulting criminal trial.[2] *McGhee*, 547 F.3d at 933; *Brewster*, 27 Fed. App'x at 912-13; App. 10a. Such a claim is especially problematic where, as here, the underlying evidence at issue no longer exists. Further, as the United States noted in *McGhee*, the danger of creating such a substantive claim is that "[e]very police . . . report, even though filed away without further action, could rise to the level of a constitutional injury upon a showing that some information in the report was knowingly false . . . . The cause of action would lie even though the inaccuracies resulted in no concrete harm[.]" Amicus Brief of the United States in *McGhee*, p. 17. Nonetheless, the Fifth Circuit adopted this standard as sufficient to state a due process claim in the decision below. App. 10a. On the other hand, if procedural due process is the proper analysis, the entire focus of the court's analysis shifts to "guaranteeing [that] a defendant receives a fair trial." *Daniels*, 474 U.S. at 337 (Stevens, J., concurring).

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[2] A distinction exists between an act which may ultimately impair a right and an act which is a "fully accomplished" constitutional violation at the time of the act itself. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

II.
It Is Unsettled Whether A Police Officer's Fabrication Of Evidence Implicates Substantive Or Procedural Due Process

A. A Split Exists Amongst The Circuits As To Whether Substantive Or Procedural Due Process Is Implicated By The Fabrication Of Evidence

The decision below squarely conflicts with the Seventh Circuit's opinion in *Alexander v. City of South Bend*, 433 F.3d 550 (7th Cir. 2006). In both cases, the § 1983 plaintiff alleged that a police officer intentionally induced a witness to choose him from a photographic lineup, leading to his wrongful conviction. *See Alexander v. City of South Bend*, 320 F. Supp. 2d 761, 770, 772 n.9 (N.D. Ind. 2004). However, despite these identical claims, the circuits' analyses fundamentally diverge when determining whether a viable due process claim has been established. Specifically, in *Alexander* the Seventh Circuit held that when asserting such a claim "[a] plaintiff . . . must demonstrate, by reference to the *Brathwaite* standard, that unduly suggestive identification procedures led to an unreliable identification that undermined the fairness of his trial." 433 F.3d at 555-56. On the other hand, the decision below expressly rejected any need to apply the *Brathwaite* test or assess the effect the challenged evidence had upon Respondent's trial. App. 8a.

These opinions mirror the two distinct views of such claims utilized by the circuits. The Seventh Circuit, lead by Judge Easterbrook, has taken the lead in holding that such claims sound in procedural due

process–embodied by the guarantee of a fair trial. Conversely, the Ninth Circuit has lead the opposing viewpoint, developing the position that substantive due process is implicated. As noted, the United States–as urged by Solicitor General Kagan's brief in *McGhee*–has indicated its position is consistent with the Seventh Circuit's.

1. Circuits Holding The Fabrication Of Evidence Implicates Procedural Due Process

a. The Seventh Circuit Formulation

Upon remand from this Court, the Seventh Circuit in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994) (Easterbrook, J.) ("*Buckley IV*"), addressed a plaintiff's allegation that false statements implicating him, but not used against him at trial, had been coerced from third parties. The court determined that the constitutional injury which stems from such a fabrication of evidence occurs when the evidence is used *at trial*, rather than at the time the evidence is fabricated. *Id.* at 794-95 ("if the constitutional entitlement is a right to prevent use of the [coerced] confession at trial . . . *[o]btaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession [against Buckley at trial] could violate Buckley's rights[.]") (emphasis in opinion).

Subsequently, the Seventh Circuit addressed a due process claim alleging that police officers had encouraged two witnesses to select the § 1983 plaintiff from a lineup, leading to his wrongful conviction and incarceration. *Newsome v. McCabe*, 256 F.3d 747, 749

(7th Cir. 2001) (Easterbrook, J.). Adopting Justice Kennedy's concurrence in *Albright v. Oliver*, 510 U.S. 266, 281 (1994) (Kennedy, J., joined by Thomas, J., concurring), the court rejected any notion that substantive due process would provide a constitutional cause of action for what was actually a claim for malicious prosecution. *Newsome*, 256 F.3d at 751. However, the court noted that a possible procedural due process claim remained because the plaintiff might "have a due process claim in the original sense of that phrase–he did not receive a fair trial[.]" *Id.* at 752.

These foundational opinions were subsequently interpreted by the Seventh Circuit to apply to all claims of evidence fabrication, including the specific circumstances of this case. *Alexander*, 433 F.3d at 555; *see Hensley v. Carey*, 818 F.2d 646, 649 (7th Cir. 1987) ("Hensley has no claim under § 1983 arising out of his participation in an unduly suggestive lineup since he was not deprived of his right to a fair trial."). Specifically, the Seventh Circuit in *Alexander* held that

> [t]he Constitution does not require that police lineups, photo arrays, and witness interviews meet a particular standard of quality. It does, however, guarantee the right to a fair trial–in this context, via the due process clause of the Fourteenth Amendment–and that right is violated if unduly suggestive identification techniques are allowed to taint the trial. The *Brathwaite* standard for evaluating the admissibility of identification evidence focuses on whether the identification procedure was

> unduly suggestive and whether the resulting identification is reliable.
>
> * * * *
>
> [Defendants] cannot be liable under § 1983 unless Alexander shows how the flaws in [Defendants'] identification techniques made his trial unfair.

433 F.3d at 555 (internal citations omitted). This holding is consistent with the Seventh Circuit's bluntest statement of its position in *McCann v. Mangialardi*, which held *Newsome* precluded a viable § 1983 due process claim alleging the "deprivation of liberty from a prosecution and a contrived conviction ... *deliberately obtained* from the use of *false evidence*" because such a "claim is, in essence, one for malicious prosecution[.]" 337 F.3d 782, 786 (7th Cir. 2003) (emphasis added). As that court concluded, "McCann cannot . . . combin[e] what are essentially claims for false arrest under the Fourth Amendment and state law malicious prosecution into a sort of hybrid substantive due process claim under the Fourteenth Amendment." *Id.*

Under the procedural due process analysis, then, the focus is on ensuring that the defendant receives a fair trial according to this Court's precedents. For example, a § 1983 plaintiff alleging that exculpatory evidence had been withheld by a police officer would be required to establish that the procedural protections of *Brady* had been violated in order to state a due process claim. As the Fourth Circuit has noted

> [a] *Brady* violation that resulted in the overturning of the § 1983 plaintiff's conviction is a *necessary, but not a sufficient*, condition for § 1983 liability on the part of the police. It is a necessary condition because the *Brady* violation establishes the requisite threshold of constitutional injury (a conviction resulting in loss of liberty) *below which no § 1983 action can lie*.

Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring) (emphasis added).[3] Thus, as *Alexander* noted, to state a viable claim regarding an impermissibly suggestive photographic lineup, the plaintiff would have to demonstrate how it's flaws tainted his trial according to *Brathwaite*. 433 F.3d at 555. Unlike a claim for false arrest or malicious prosecution, such a due process claim focuses on the trial proceedings and the constitutional guarantee that those proceedings be conducted fairly. *Newsome*, 256 F.3d at 751.

b. Circuits Subscribing To The Seventh Circuit Formulation

The Second and Sixth Circuits' positions are in accord with the Seventh Circuit's holding that the fabrication of evidence implicates only a defendant's procedural due process right to receive a fair trial. *See Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000) ("The manufacture of false evidence, 'in and of itself,'

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[3] *Jean* was an en banc opinion decided by an evenly divided Fourth Circuit. The one-paragraph decision was issued *per curiam*, along with several other opinions.

. . . does not impair anyone's constitutional right.")[4] (citation omitted);[5] *Gregory v. City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006) ("a person's constitutional rights are violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury."); *Hutsell v. Sayre*, 5 F.3d 996, 1004-05 (6th Cir. 1993) (§ 1983 plaintiff who challenges use of suggestive identification procedure rather than "a violation of the core right to a fair trial" has failed to state a viable constitutional claim). Further, the Tenth Circuit has favorably cited *Newsome* as establishing the appropriate analysis for evaluating due process claims based upon the fabrication of evidence. *Pierce v. Gilchrist*, 359 F.3d 1279, 1286 (10th Cir. 2004).

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[4] In *Coffey*, the Second Circuit followed *Buckley IV*, but noted that the fabrication could still state a viable procedural due process claim under the Fourteenth Amendment if the use of the evidence was causally linked to an impairment of the plaintiff's liberty interest. *See Coffey*, 221 F.3d at 352, 354; *compare Newsome*, 256 F.3d at 751.

[5] *Coffey* has been understood to recognize a procedural due process protection. *See Zahrey v. City of New York*, No. 98-4546 (DCP) (JCF), 2009 WL 1024261, **7-8 (S.D.N.Y. Apr. 15, 2009). However, despite *Coffey*'s precedent, Justice Sotomayor, while a member of the Second Circuit, noted in *Rolon v. Henneman* that while *Coffey* required that the fabricated evidence be "used against him to cause a constitutional injury[,]" she was not required in that opinion to decide "whether the reasoning of *Albright* forecloses the possibility of substantive due process claims under the Fourteenth Amendment in the context of fabrication of evidence." 517 F.3d 140, 148, 148 n.4 (2d Cir. 2008) (Sotomayor, J.).

2. Circuits Holding That The Fabrication Of Evidence Implicates Substantive Due Process

a. The Ninth Circuit Formulation

The Ninth Circuit has held that the fabrication of evidence implicates substantive due process because there exists "a clearly established constitutional due process right not to be *subjected to criminal charges* on the basis of false evidence that was deliberately fabricated by the government." *Devereaux*, 263 F.3d at 1074-75 (emphasis added); *see Rose v. San Joaquin County*, No. 2:05-cv-2208-GEB-PAN(JFM), 2006 WL 1795103, **6-7 (E.D. Cal. June 28, 2006) (citing *Devereaux* as recognizing a substantive due process claim). *Devereaux* held this right to be clearly established despite the fact that the court found no "prior cases that have expressly recognized this specific right." *Id.* at 1075. As *Brewster* subsequently recognized, *Deveraeux*'s formulation contained no requirement that the resulting trial itself be made unfair. *Id.*; *Brewster*, 27 Fed. App'x at 912-13 (recognizing due process claim based upon use of a "suggestive procedure intended to produce a false identification").

The tension between the Ninth Circuit's formulation and the precedents of this Court (discussed *infra*) is that the resulting substantive due process claim appears to be the same claim that this Court rejected in *Albright*. *Compare Devereaux*, 263 F.3d at 1074-75 (recognizing "a clearly established constitutional due process right not to be subjected to criminal charges"); *with Albright*, 510 U.S. at 314 (Stevens, J., dissenting) (recognizing that the claim the

majority of the Court rejected–albeit on differing rationales–was that "[p]etitioner was *subjected to criminal charges* by an affirmative, deliberative act of a state official") (emphasis added). Indeed, this Court squarely rejected such a claim. *Albright*, 510 U.S. at 268 (plurality opinion) (rejecting substantive due process claim "to be free from criminal prosecution except upon probable cause").

b. Circuits Subscribing To The Ninth Circuit Formulation

Several circuits have followed the Ninth Circuit's adoption of a substantive due process right. In *McGhee*, for example, the Eighth Circuit expressly held that a plaintiff had alleged a violation of his "substantive due process rights" where he asserted that a prosecutor "obtain[ed], manufactur[ed], coerc[ed] and fabricat[ed] evidence before filing formal charges[.]" 547 F.3d at 933. By holding that the substantive due process violation accrued prior to the use of the evidence at trial, the Eighth Circuit made it clear that the focus of the violation was not on whether the fabrication resulted in an unfair trial, but rather that the fabrication occurred at all. *Id.* at 932-33. While the Eighth Circuit avoided citing *Devereaux*, it's author, Judge Tashima, sat by designation on the Eighth Circuit panel.[6]

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[6] A closely divided Eighth Circuit, sitting en banc, had previously recognized a similar substantive due process claim *Moran v Clark*, 296 F.3d 638 (8th Cir. 2002) (en banc) (five judge majority, one concurring in judgment, four dissenting).

Other circuits have expressly recognized a substantive due process right based upon *Devereaux*'s holding. *See White v. Wright*, 150 Fed. App'x 193, 198-99 (4th Cir. 2005) (unpublished);[7] *Limone v. Condon*, 372 F.3d 39, 45 (1st Cir. 2004) (fabrication of evidence (i.e., influencing a witness to give false testimony) violates due process).[8]

The decision below follows the Ninth Circuit's precedents by establishing a substantive due process claim at the time evidence is fabricated. App. 8a-9a. This holding relieved the Fifth Circuit from engaging in any analysis of the Respondent's trial or its fairness–even though a great deal of evidence relevant thereto, including the trial transcripts, were in the summary judgment record. *Compare Alexander*, 433 F.3d at 555. Further, although the Fifth Circuit avoided any express identification of a "substantive" right, it has historically avoided enunciating the

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[7] There is tension within the Fourth Circuit between this decision and *Jean*, requiring that the underlying constitutional harm be proven in order to establish a viable claim. *Jean*, 221 F.3d at 663, 221 F.3d at 674 (Murnaghan, J., dissenting) ("because the right to exculpatory evidence is already protected under procedural due process, *Graham* [*v. Connor*] prohibits the concurrence from recharacterizing the police officers' withholding of evidence as governed by substantive due process (based on the unsupportable notion that there is a 'fundamental' liberty interest in exculpatory evidence)").

[8] While *Limone* cites *Devereaux*, there is conflict on this point within the First Circuit. *See Landrigan v. City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("[W]e do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws.").

distinction between procedural and substantive due process rights in similar contexts. *See Castellano v. Fragozo*, 352 F.3d 939, 962 (5th Cir. 2003) (en banc) (Barksdale, J., concurring in part and dissenting in part) (criticizing majority's failure to make this distinction).

In summary, review is warranted to resolve this ongoing and persistent split among the circuits.

B. The Decision Below And The Ninth Circuit Formulation Conflict With The Relevant Decisions Of This Court

Regardless of how asserted, this Court's due process analysis concerning *evidence* used against a criminal defendant has always focused on how said evidence, even if improper, affected the underlying criminal trial. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 289-90 (1999) (habeas corpus); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (criminal appeal); *Weatherford v. Bursey*, 429 U.S. 545, 560-61 (1977) (§ 1983 claim). This is because "[i]n state criminal trials, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt[.]" *Cage v. Louisiana*, 498 U.S. 39, 39 (1990) (per curiam). Accordingly, it has been long established by this Court that

> [a] criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally

> acquired by others does not necessarily violate the Constitution nor affect its admissibility.

McGuire v. United States, 273 U.S. 95, 99 (1927). As a result, the recognition in the decision below of a substantive due process claim is a wholesale departure from this Court's precedents. *See* Sup. Ct. R. 10.

1. This Court's Precedents Do Not Recognize A Substantive Due Process Claim Based Upon The Fabrication Of Evidence Divorced From The Subsequent Corruption Of Trial Proceedings

a. The Limited Scope Of Substantive Due Process

The fabrication of evidence does not itself violate a constitutional right. As Justice Scalia has noted, "[there is] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring); *contra* App. 8a. On the other hand, the decisions of this Court which have recognized a substantive due process violation have universally been limited in their scope to those associated with protecting individuals from conduct which is "so brutal and so offensive to human dignity" that it "shocks the conscience[.]" *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (the Due Process Clause must at least "give protection against torture, physical or mental"), *overruled on other grounds*, *Benton v.*

Maryland, 395 U.S. 784 (1969). Indeed, the cases in which this Court has recognized the existence of a substantive due process claim premised upon police misconduct have universally involved the use of torture or conduct which resulted in physical harm or suffering.[9] *Rochin*, 342 U.S. at 172; *cf. Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (Thomas, J.) (three justices finding that questioning a suspect in physical agony not exacerbated by officer does not violate substantive due process); *Albright*, 510 U.S. 266 (seven justices held no substantive due process remedy for prosecution without probable cause); *see Albright*, 510 U.S. at 272 (plurality opinion) ("[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.").

These limitations are consistent with the overall concern that substantive due process not become a "font of tort law to be superimposed upon whatever systems may already be administered by the States[.]" *Paul v. Davis*, 424 U.S. 693, 701 (1976). In fact, this "Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009) (quotation omitted). In furtherance of this principle, this Court has repeatedly held that where "a constitutional claim is covered by a specific

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[9] The Court has distinguished substantive due process's applicability in cases seeking to recover for executive actions from those addressing, for example, legislative enactments. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-47, 847 n.8 (1998).

constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *see Albright*, 510 U.S. at 273 (plurality opinion); *Graham v. Connor*, 490 U.S. 386, 395 (1989).

In determining when a constitutional violation is complete, and therefore actionable under § 1983, the distinction between procedural and substantive claims is vital. *See Verdugo-Urguidez*, 494 U.S. at 264. It is the *act* itself which causes a substantive due process violation, rather than any resulting corruption of the trial which procedural due process would protect. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). For example, when a confession is obtained from an accused by torture, it is the very act of torture, not the confession's use at trial, which violates the accused's substantive due process rights. *Chavez*, 538 U.S. at 773 (plurality opinion) ("police torture or other abuse that results in a confession is [not] constitutionally permissible so long as the statements are not used at trial . . . [but] the Fourteenth Amendment's Due Process Clause . . . would govern the inquiry in those cases and provide relief in appropriate circumstances.").

Review is therefore warranted because the decision below impermissibly expands upon these precedents.

b. This Court's Precedents Recognize That The Corruption Of Evidence Used In A Criminal Proceeding Is A Procedural Due Process Violation

It is well settled that the knowing use of perjured testimony and suppression of exculpatory evidence violates the protections of the Due Process Clause. *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam). However, as a majority of this Court recognized in *Albright*, *Mooney*'s protection is procedural, rather than substantive, in nature. *Albright*, 510 U.S. at 273 n.6 (plurality opinion) (both *Mooney* and *Brady v. Maryland*, 373 U.S. 88 (1963), were cases "dealing with the defendant's right to a fair trial mandated by the Due Process Clause") (citations omitted); *Albright*, 510 U.S. at 283 (Kennedy, J.) ("The constitutional requirements we enforced [in *Mooney*] ensure fundamental fairness in the determination of guilt at trial."). Since *Mooney*, this Court has addressed on numerous occasions how evidence which was alleged to have been withheld, undisclosed, destroyed, or surreptitiously acquired affects the underlying constitutional right protected by the Due Process Clause: that of the accused's right to a fair trial. *See, e.g.*, *Strickler*, 527 U.S. at 289-90; *Payne*, 501 U.S. at 825; *Weatherford*, 429 U.S. at 560-61. With the exception of the instances of police torture discussed *supra*, this Court's focus in its due process jurisprudence has always been on how (and whether) the allegations would result in the corruption of the accused's trial. WANYE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 1110 (3d ed. 2000) ("Because the *Mooney* principle is based upon the defendant's right to a fair trial, the Court has refused to go as far as to hold that the knowing failure to correct false testimony produces

a due process violation without regard to whether the false testimony was likely to have had an impact upon the outcome of the trial").

Most relevant to this case, this Court in *Brathwaite* addressed the issue of when the admission of a suggestive preindictment identification procedure violated the due process rights of a defendant. 432 U.S. 98. Specifically, *Brathwaite* held that the admission of the preindictment identification procedure did not violate the due process rights of the defendant unless it "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 106 n.8 (quotation omitted). Accordingly, even where a preindictment identification procedure was undisputedly suggestive, a defendant's due process rights *were not* violated so long as the reliability factors set out in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), were satisfied. *Brathwaite*, 432 U.S. at 114. This Court made it abundantly clear that it was procedural due process that this constitutional protection implicated since "[t]he standard, after all, is that of fairness[.]" *Id.* at 113. Finally, *Brathwaite* was clear that the trial itself must have been affected, because "[u]nlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Id.* at 113 n.13.

Subsequent cases questioning evidence used at trial have confirmed that this Court's focus in the due process analysis is squarely upon whether such allegations would have resulted in the corruption of the defendant's right to a fair trial. *See Strickler*, 527 U.S. at 281 (no constitutional violation under *Brady* "unless the nondisclosure was so serious that

there is a reasonable probability that the suppressed evidence would have produced a different verdict."); *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (per curiam) (to constitute a due process violation, evidence must *inter alia*, be of the type which would exonerate the defendant); 488 U.S. at 59 (Stevens, J., concurring) ("Although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission."); 488 U.S. at 61 (Blackmun, J., dissenting) (failure to preserve evidence "significantly prejudiced" criminal defendant's trial); *see also Chavez*, 538 U.S. at 772 (the "violation[] of judicially crafted prophylactic rules do[es] not violate the constitutional rights of any person."). Simply put, where a § 1983 plaintiff cannot establish a violation of his right to a fair trial, his claim fails to satisfy the threshold required to avoid an officer's defense of qualified immunity. *Saucier*, 533 U.S. at 201.

2. The Decision Below Failed To Properly Apply This Court's Precedents And Examine Whether The Trial Proceedings Had Been Corrupted

In its decision below, the Fifth Circuit failed to engage in any analysis whatsoever of whether the Respondent's criminal proceedings had been corrupted. To the contrary, it concluded that it was excused from this analysis by the mere fact that his claim arises under § 1983. App. 8a. Without citing any authority, the Fifth Circuit then declared that the well-established test for determining the propriety of the admission of a preindictment identification procedure "does not apply in the context of a § 1983 suit following DNA exoneration[.]" App. 8a. This notwithstanding the

fact that the Respondent's exoneration by DNA evidence (as opposed to a finding of trial error) rendered it entirely plausible that the photographic lineup at issue herein wholly complied with the constitutional requirements for admissibility. *Id.*; *see Ex Parte Good*, 2004 WL 3259016. As a result, the decision below would establish competing and inconsistent standards for the same constitutional harm: one for § 1983 plaintiffs and a different one for other constitutional claims (e.g., habeas petitioners). App. 8a-9a; *see Strickler*, 527 U.S. at 281; *Brathwaite*, 432 U.S. at 114; *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("[i]n order to declare a denial of [due process in a habeas action] we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."). Such competing levels of constitutional scrutiny have never been recognized by this Court, and the decision below, if left to stand, would permit a § 1983 plaintiff to recover for a due process violation if his trial was entirely fair, he was, in fact, guilty of the offense, or even where there was no trial. However, in truth, even if an officer intended to create a suggestive photographic lineup, but by his own negligence or random coincidence happened to create a lineup which unquestionably complied with constitutional standards, then no harm befell the accused; just as under *Brady* an officer intentionally withholding evidence would not have harmed the accused unless that evidence was, in fact, material and exculpatory. *Accord Alexander*, 433 F.3d at 555; *Jean*, 221 F.3d at 663.

Simply put, an accused is protected from being subjected to constitutionally deficient evidence at trial by a specific constitutional provision: procedural due

process. U.S. CONST. amend. XIV; *Lanier*, 520 U.S. at 272 n.7 (1997); *Albright*, 510 U.S. at 273 (plurality opinion); *Graham*, 490 U.S. at 395; *Jean*, 221 F.3d at 674 (Murnaghan, J., dissenting). As a result, it is that express provision, rather than "the more generalized notion of 'substantive due process,' [which] must be the guide for analyzing these claims." *Albright*, 510 U.S. at 273; *accord Moldowan v. City of Warren*, 578 F.3d 351, 377 n.6 (6th Cir. 2009); *Zahrey v. City of New York*, 2009 WL 1024261 at *9.

In summation, review of the decision below is warranted because it is contrary to this Court's precedents.

III.
It Remains Unsettled Whether A Police Officer Can Be Held Liable For The Erroneous Admission Of Constitutionally Deficient Evidence At Trial

The decision below holds that a police officer may be held civilly liable in instances where evidence is erroneously admitted by the trial court, notwithstanding the fact that the trial court was fully apprised of the relevant facts when making its erroneous decision regarding admissibility. App. 11a-12a. As discussed *supra*, the test espoused by this Court to determine whether a preindictment identification procedure is admissible is based upon the suggestiveness of the procedure itself and, if unduly suggestive, the reliability of the witness's identification. *Brathwaite*, 432 U.S. at 113-14. The decision below held that because the Petitioner intended to create a suggestive lineup, the trial court's decision that he did not actually do so (i.e., the lineup

he created was not suggestive) is of no import. App. 11a-12a. However, the decision below fails to address whether it is foreseeable to a police officer that a judge would so err, and whether, once the trial judge has ruled that the lineup's appearance complied with constitutional requirements, it is reasonable for the officer to believe that, despite what may have been a malicious motive when he created same, the lineup as constructed did not violate the criminal defendant's constitutional rights. *Saucier*, 533 U.S. at 201. In this regard, the decision below fails to address the key issue identified by the other circuits who have analyzed this issue: that of the foreseeability required to impose civil liability.

This Court has expressly held that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Brathwaite*, 432 U.S. at 113 n.13. As a result, Respondent's constitutional violation, if any, became cognizable only when that lineup was introduced at his criminal trial. *Id*. The Second Circuit has held in a nearly identical circumstance that a police officer could not be held liable for conducting an improper preindictment identification procedure where the trial judge had fully reviewed and admitted same into evidence. *Wray*, 490 F.3d 189. The decision below directly conflicts with this holding, as well as the position of the Third Circuit which has adopted and further explained the Second Circuit's rationale. *Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004).

A. The Circuits Are Split As To Whether An Independent Judicial Determination Of Admissibility Breaks The Causal Chain Of Liability For The Admission Of Constitutionally Deficient Evidence

The *Wray* court faced a claim nearly identical to that asserted by Respondent herein: allegations that a police officer "violated his constitutional due process and fair trial rights by conducting the unduly suggestive [] identification, and seek[ing] damages under § 1983 for his conviction and incarceration." *Wray*, 490 F.3d at 192-93. Notably, *Wray* was not a case involving a DNA exoneration, but rather a case where it was undisputed the defendant officer had, in fact, violated the *Brathwaite* standard. *See Wray v. Johnson*, 202 F.3d 515 (2d Cir. 2000) (granting habeas corpus). As a result, the underlying constitutional harm was already established, and the only issue before the court was whether the officer could be held civilly liable for same. *Wray*, 490 F.3d at 192-93. The Second Circuit held that he could not "in the absence of evidence that [he] misled or pressured the prosecution or trial judge" because his conduct did not cause the violation of Wray's constitutional rights; "rather, the violation was caused by the ill-considered acts and decisions of the prosecutor and trial judge." *Id.* at 195. Said holding was consistent with Second Circuit precedent regarding the causal link between a police officer's actions and his foreseeability that a trial judge would make an erroneous decision by admitting constitutionally deficient evidence. *Townes v. City of New York*, 176 F.3d 138, 146-47 (2d Cir. 1999) (damages from wrongful conviction and incarceration were not proximately caused by police officer because trial judge's erroneous decision not to

suppress unlawfully seized evidence was an exercise of independent judgment). While these decisions may initially seem consistent with the decision below, the key feature in this analysis is the recognition that the causal chain is broken insofar as the officer is concerned unless his act of withholding information or misleading the trial judge is relevant to the judge's *legal* decision. *Young*, 366 F.3d at 248 (chain of causation still broken "when the trial court committed an error of law unrelated to the conduct of the [§ 1983] defendant police officers.").

In *Young*, the Third Circuit explained when a court's decision breaks the chain of causation in regard to a government official, even when that official was "clearly a cause of the plaintiff's harm." *Id.* at 250. Specifically, the court concluded that

> in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the *relevant* facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions. However, we draw a distinction between that situation and the facts as presented both here and in *Townes*, where the actions of the defendants, while clearly a cause of the plaintiff's harm, do not create liability because of the intervention of independent judicial review, a superseding cause. We conclude that where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and

> procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability.

Id. at 250-51 (emphasis added). Therefore, pursuant to the jurisprudence of the Second and Third Circuits, when a § 1983 plaintiff's constitutional rights are violated by the improper admission of evidence at trial, he may not impose liability upon the responsible officer where an intervening judicial intermediary, who is presented with all of the *relevant* information, concludes–even erroneously–that the evidence was admissible. *Id.*; *Coffey*, 221 F.3d at 352 n.8 (even where there has been misconduct on the part of an official, "[t]he initial wrongdoer might avoid liability where the intervening decision-maker would have precipitated the deprivation of liberty, even in the absence of the antecedent misconduct; in that circumstance, 'but for' causation could be claimed to be lacking.").

What information must be presented to a judicial intermediary in order for the causal chain to be broken? For a case such as this one, *Wray* provides the answer: the information necessary to fully analyze whether the preindictment identification procedure satisfies the *Brathwaite* test. *Wray*, 490 F.3d at 193. Where the trial judge has that information, his error in admitting the preindictment identification defeats liability against the officer because the officer's "conduct was not itself a constitutional violation[.]" *Id.* at 194.

The decision below does not address this distinction. Instead, it suggests that the Respondent

may assert his claim against Petitioner despite the fact that, before any constitutional harm occurred, the trial judge found that the photographic lineup itself was not, in fact, suggestive, a decision wholly independent of whether Petitioner created it with malice, negligence, or in good faith. App. 11a-12a. Had the decision below been controlling in *Wray*, that plaintiff's suit against the defendant officer–who *had* violated *Brathwaite*–would have continued despite the trial court's erroneous finding that *Brathwaite* had been satisfied. *Wray*, 490 F.3d at 195. Permitting this type of constitutional tort claim would be no different than permitting a plaintiff to bring a claim alleging an officer intentionally did not disclose *Brady* evidence even though a judicial intermediary determined in the course of the underlying proceeding that the undisclosed evidence was not, in fact, material or exculpatory. *See Jean*, 221 F.3d at 663. Further, because the trial court found that the appearance of the photographic lineup was not suggestive, it was never required to address the second *Brathwaite* element of reliability. *Brathwaite*, 432 U.S. at 112-13; *Peters v. Whitley*, 942 F.2d 937, 939 (5th Cir. 1991). As a result, these circumstances mirror the circumstance addressed in *Coffey*, where the deprivation of a plaintiff's liberty by the admission of improper evidence at trial would have occurred "even in the absence of the antecedent misconduct[.]" *Coffey*, 221 F.3d at 352 n.8. However, the decision below did not address these conflicting precedents. As a result, review of same is warranted to resolve the split amongst the circuits as to whether the trial court's ruling precludes the imposition of § 1983 liability.

B. The Decision Below Is Contrary To The Resolution Suggested By This Court's Precedents

As Justice White noted nearly thirty-years ago, "[s]ection 1983 actions for wrongful arrest and prosecution are frequently brought against police officers. The causation issue will be important, if not dispositive, in many of these cases." *Smith v. Gonzales*, 459 U.S. 1005, 1007 (1982) (White, J., dissenting from denial of certiorari). Four years later in *Malley v. Briggs*, a case where causation was *not* included in the grant of certiorari, this Court suggested that common law principles govern the establishment of the "causal link" to a police officer's conduct in § 1983 claims. 475 U.S. 335, 345 n.7 (1986). Many years later, this Court again declined to address this issue in *Michaels v. McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari), and when it was to finally address this issue in its last term, the case settled. *McGhee*, 130 S.Ct. 1047 (mem.). However, because this Court's precedents suggest that the common law controls this issue, the decision below is in conflict with this Court's probable holding. Sup. Ct. R. 10(c).

It has been well settled in this Court that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Therefore, when determining whether the necessary causation has been established to impose § 1983 liability, this Court has looked to whether "the common law recognized th[is] causal link[.]" *Malley*, 475 U.S. at 344 n.7; *see Heck v. Humphry*, 512 U.S. 477, 483 (1994) (common law is the starting point for § 1983 causal analysis).

The common law has long recognized the principle of superceding cause which prevents an individual who may be an underlying tortfeasor from being held civilly liable. RESTATEMENT (SECOND) OF TORTS § 440 (1965). Further, courts interpreting this Court's limited guidance in *Malley* have in almost all instances–the decision below being a notable exception–interpreted *Malley* to provide that the causal chain of an officer's improper act is broken by the superceding cause of a judicial officer's review unless the judicial officer was somehow misled as to the *relevant* facts. *See Egervary*, 366 F.3d at 247-48; *Manta Mgmt. Corp. v. City of San Bernardino*, 181 P.3d 159, 166 (Cal. 2008) (citing numerous cases including *Wray*, *Egervary*, and *Townes* for the holding that the causal chain is broken in absence of evidence that court was pressured or misled as to relevant facts). As discussed *supra*, there is no evidence that *relevant* information was withheld from the reviewing trial court in this case due to the undisputed fact that the photographic lineup prepared by Petitioner was presented to the trial judge and that the judge, after examining same and hearing relevant testimony, ruled that, beyond a reasonable doubt, the lineup as it appeared on its face complied with the *Brathwaite* test (i.e., it was not suggestive). App. 44a; *see Wray*, 490 F.3d at 194-95; *Townes*, 176 F.3d at 146-47. As a result, common law would recognize a superceding break in the causal chain, and the decision below is therefore contrary to this Court's precedents indicating that common law principles should apply to § 1983 claims.

Certiorari should therefore be granted to resolve this conflict. *See Egervary*, 366 F.3d at 248 (finding that judicial decision breaks causal chain under "traditional tort concepts of independent, intervening

cause.") (citing RESTATEMENT (SECOND) OF TORTS § 440).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2010

APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-10341

[Filed March 23, 2010]

DONALD WAYNE GOOD,	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
FRED CURTIS, individually and in his official capacity,	)
	)
Defendant-Appellant	)

Appeal from the United States District Court for the Northern District of Texas

Before STEWART, DENNIS, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Appellant's Motion for Panel Rehearing is DENIED. This opinion is substituted in place of the prior opinion, *Good v. Curtis*, __ F.3d __, 2010 WL 550520 (5th Cir. Feb. 18, 2010).

Appellee Donald Wayne Good brought suit under 42 U.S.C. § 1983 against Appellant Fred Curtis, alleging that Curtis violated Good's rights under the Fourth and Fourteenth Amendments when he manipulated a photographic lineup in an effort to procure a false identification from the victim in a rape case. Curtis takes this interlocutory appeal from the district court's denial of his motion for summary judgment on the basis of qualified immunity. The only issue before us today is whether Curtis is entitled to qualified immunity with regard to the alleged violations of Good's Fourth and Fourteenth Amendment rights. On this limited appeal, we conclude that the district court correctly determined that the genuine issues of fact regarding Curtis's conduct were material to the denial of qualified immunity and, therefore, DISMISS the appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case, viewed in the light most favorable to Good as the non-moving party, are as follows. On June 18, 1983, Good was arrested and charged with aggravated rape, aggravated robbery, and burglary of a habitation. After no less than three trials, Good was wrongfully convicted and sentenced to life imprisonment. After serving thirteen years, seven months, and five days in prison, Good was finally exonerated by DNA evidence on December 22, 2004.

Good's long and unfortunate path through the legal system began on June 9, 1983, when a man entered the Irving, Texas home of Jane Doe, bound her and her eight-year old daughter and forced Doe to the bedroom, where he raped her. Shortly after the man left, Doe

was able to free herself and her daughter and called the Irving Police Department. The crime scene was subsequently processed for evidence. At the same time, a local hospital examined Doe and administered a rape kit. Later that day, Doe met with police and described her assailant as a white male in his twenties, six feet tall, about 190 pounds, clean shaven, with a medium to large build, blondish-brown hair, and dark tan skin tone. Based on Doe's description, a composite sketch of the perpetrator was prepared and then distributed throughout the Irving Police Department.

On June 15, 1983, Good was arrested in an unrelated incident stemming from a bond forfeiture on a prior DWI charge. Curtis, who was not assigned to the investigation of Doe's rape, had suspected Good was responsible for certain unsolved daytime burglaries in Irving. Accordingly, Curtis brought Good to his office for the purpose of interviewing him about the unsolved burglaries. During the interview, Curtis became angry with Good when he would not provide any information on the burglaries. Curtis pulled out a copy of the composite sketch in the Doe case and informed Good that he looked somewhat similar to the assailant and that, if Good did not think the picture looked like him, Curtis would "fix it" to make sure that it did.

When Good persisted in his refusal to address the unsolved burglaries, Curtis told Good he was going to get him charged with Doe's rape and took Good outside of his office to photograph him for a lineup. Curtis proceeded to take several pictures of Good. He repeatedly altered the light settings on the camera with each picture in an effort to make Good's photograph better match the "dark tan" skin tone of

the suspect in the police sketch. Once satisfied with the resulting photograph, Curtis added it to a lineup and separately presented it to Doe and her daughter. Doe's daughter was unable to make an identification. Doe, on the other hand, immediately selected Good out of the lineup. She became very emotional upon seeing Good's photograph and identified him as her attacker. As a result, Good was rearrested on June 18, 1983, and charged with aggravated rape, aggravated robbery, and burglary of a habitation.

After Doe's identification of Good in the photographic lineup, a live lineup followed on July 26, 1983, conducted by the Dallas County Sheriff's Department. The participants in the lineup were given specific phrases that the perpetrator used during the home invasion to repeat during the lineup. Doe again, and her daughter for the first time, identified Good as the perpetrator.

Good's first criminal trial, in 1983, ended in a hung jury. His second trial, in 1984, resulted in a guilty verdict, but the verdict was later overturned because of prosecutorial misconduct unrelated to the photographic lineup. In 1987, the government tried Good for a third time, and he was convicted of burglary of a habitation with intent to commit rape. In each of the criminal trials, both Doe and her daughter identified Good as the attacker.

In 2001, the Dallas County Criminal District Court No. 3 granted Good's motion for post-conviction DNA testing of the biological evidence from the crime scene. The DNA test ruled Good out as Doe's attacker. Based on this new finding, the Texas Court of Criminal Appeals granted Good's state habeas petition and

vacated his sentence on November 17, 2004, followed by the Dallas County Criminal District Court No. 3's dismissal of all charges on December 22, 2004.

On November 17, 2006, Good filed a complaint in the U.S. District Court for the Northern District of Texas against the City of Irving; the Irving Police Department; the Chief of Police for the City of Irving, individually and in his official capacity; and Curtis, individually and in his official capacity, under 42 U.S.C. § 1983 for alleged violations of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and article I, section 19 of the Texas Constitution. In March 2007, the district court dismissed all claims against the Irving Police Department, the Irving Chief of Police, in his official and individual capacities, and Curtis, in his official capacity. On June 1, 2009, the district court also dismissed all claims against the City of Irving and the claims against Curtis, in his individual capacity, based on alleged violations of Good's First, Fifth, Sixth, Eighth and Ninth Amendment rights.

Still, the district court did not entirely dismiss Good's case. The district court denied Curtis's motion for partial judgment on the pleadings and motion for summary judgment as to Good's claims based on alleged violations of the Fourth and Fourteenth Amendments as well as article I, section 19 of the Texas Constitution because genuine issues of fact existed as to whether Curtis was entitled to qualified immunity. This interlocutory appeal followed with regard to Curtis's qualified immunity defense in connection with Good's claims under the Fourth and Fourteenth Amendments.

II. STANDARD OF REVIEW

"[A]n order denying qualified immunity, to the extent it turns on an 'issue of law,' is immediately appealable." *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)) (citation omitted). This jurisdiction includes interlocutory appeals from denials of motions for summary judgment. *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 251 (5th Cir. 2005) (citing *Behrens*, 516 U.S. at 307); *see also* 28 U.S.C. § 1291.

The limitation of our interlocutory appellate jurisdiction to questions of law prohibits our "consider[ation] [of] the correctness of the plaintiff's version of the facts." *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009) (quotation omitted). In other words, "[t]he essentially legal [immunity] question, which we treat as an entitlement distinct from the merits of the case, is appealable only to the extent that it turns on an issue of law[.]" *Atteberry*, 430 F.3d at 252 (second alteration in the original) (quotations omitted).

This means that the district court's finding that a *genuine* factual dispute exists is a factual determination that this court is prohibited from reviewing in this interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). But the district court's determination that a particular dispute is *material* is a reviewable legal determination. *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337 (5th Cir. 2003). "Thus, a defendant challenging the denial of a motion for summary judgment on the basis of qualified immunity must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised

by the appeal." *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007) (quotation omitted).

Within this limited appellate jurisdiction, "[t]his court reviews a district court's denial of a motion for summary judgment on the basis of qualified immunity in a § 1983 suit de novo." *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) (citing *Freeman*, 483 F.3d at 410); *see also Club Retro*, 568 F.3d at 194; *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009).

III. DISCUSSION

Good contends that his Fourth and Fourteenth Amendment rights were violated when Curtis manipulated Good's picture to create an inaccurate photo lineup in an effort to procure a false identification. Specifically, Good claims that: (1) this intentional effort to cultivate an irreparable misidentification constitutes a violation of due process, and (2) Curtis secured the subsequent charges leading to Good's conviction without probable cause. We address both claims in turn.

A. Good's Fourteenth Amendment Claim

We turn first to the question of whether a concerted effort on the part of a police officer to "frame" a suspect by manipulating a photo for a photo lineup to produce a false identification from an eyewitness constitutes a violation of the due process rights secured by the Fourteenth Amendment and whether such a violation was clearly established at the time Curtis acted. Thus applying the rubric of qualified immunity, we find that such conduct would constitute a violation of the Fourteenth Amendment and that any officer so acting

would not be entitled to qualified immunity. Accordingly, Good has raised a genuine issue of material fact sufficient to overcome summary judgment on his Fourteenth Amendment claim.

Curtis relies upon cases which involve a test designed primarily to suppress evidence where an identification may be questionable but has not been disproved to assess the constitutionality of his actions. However, this case concerns a situation where the criminal defendant has been exonerated and was wrongly convicted because – taking the facts most favorable to Good – a police officer deliberately framed him. The DNA evidence that cleared Good and secured his freedom also removes all doubt as to the inaccuracy of Doe's identification. The reason for the misidentification, we must assume at this summary judgment juncture, was Curtis's concerted efforts to manipulate the photo. The Supreme Court's "suggestive lineup" suppression test announced in *Manson v. Brathwaite*, 432 U.S. 98 (1977), is not designed for and does not apply in the context of a § 1983 suit following DNA exoneration for a conviction derived from police conduct intentionally designed to procure a false identification by unlawful means.

As directed by our decision in *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989) (*Geter II*), we conclude that a police officer's knowing efforts to secure a false identification by fabricating evidence or otherwise unlawfully influencing witnesses is not entitled to qualified immunity. *See also Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc) ("[W]e are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that

was deliberately fabricated by the government."); *Brewster v. Shasta County*, 27 F. App'x 908, 912-13 (9th Cir. 2001) (unpublished) (applying *Devereaux* where "the detectives used suggestive procedures with the intent of obtaining an identification of [the plaintiff], irrespective of whether he was in fact guilty"). Because we now know without a doubt that Doe's identification was actually incorrect, we need not analyze whether, hypothetically, this lineup suffered from a high "likelihood of misidentification." *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (originating the factors used in *Brathwaite* analysis as aids in assessing the "likelihood of misidentification" under a totality of the circumstances review).

Our analysis of Good's Fourteenth Amendment claim is instead guided by our decisions in *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988) (*Geter I*), and *Geter II*. Both *Geter* cases involved a § 1983 action stemming from an individual's arrest, prosecution, and conviction for a robbery he did not commit. In *Geter I*, we held that "a police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means . . . for such activity violates clearly established constitutional principles." 849 F.2d at 1559. Nonetheless, we found the plaintiff's allegations to be too conclusory and remanded the matter to the district court for further factual development. *Id.* at 1559-61. On remand, the plaintiff set forth "a wealth of specifics and confirming factual details" supporting his claim that the officers had framed him. *Geter II*, 882 F.2d at 170. Notwithstanding the fact that we acknowledged *Brathwaite* in both *Geter I* and *II*, neither opinion expressly required or even suggested that the district court was obligated to apply *Brathwaite*'s "suggestive

lineup" suppression test to the plaintiff's claim under those facts. *See Geter I*, 849 F.2d at 1559; *Geter II*, 882 F.2d at 170 n.6. Instead, in *Geter II*, we ultimately held that the plaintiff created genuine issues of material fact sufficient to overcome qualified immunity by presenting competent summary judgment evidence as to which witnesses were encouraged to give false identifications and what means were used to encourage the witnesses to wrongly identify the plaintiff. 882 F.2d at 170.

Applying *Geter I* and *II* to the instant case, Good has clearly met his burden at this early stage. Good alleged that Doe's identification was tainted by Curtis's conduct. That taint persists to this day as Doe still insists on Good's guilt even after his exoneration by indisputable forensic evidence. Moreover, Good has provided "specifics and confirming factual details" regarding the alleged "unlawful means": (1) Curtis stated he planned to frame Good for failing to cooperate; (2) Curtis artificially manipulated Good's photograph to conform to the composite sketch and description of Doe's assailant by darkening the pictures he took; and (3) Curtis knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Good's non-cooperation regarding a wholly unrelated crime. Good's articulation of these allegations through competent summary judgment evidence is sufficient to create a

factual basis[1] for finding a constitutional violation within Good's Fourteenth Amendment § 1983 claim.

Having found a constitutional violation, we turn briefly to the second prong of qualified immunity. The Supreme Court has repeatedly held that "government officials performing discretionary functions [enjoy] qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Stated more pointedly, qualified immunity generally protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In the instant case, Curtis is alleged to have intentionally secured a false identification that produced a wrongful conviction in retaliation for a suspect's failure to cooperate in an unrelated matter – a *Malley* "knowing violation of the law."

Finally, we turn to Curtis's novel argument that the trial court's subsequent approval of the fabricated lineup absolves him of responsibility for the unfair trial and wrongful conviction it produced. Curtis does not cite any case from this circuit involving the so-called "neutral intermediary" doctrine in the Fourteenth Amendment context. That said, and though we do not attempt to affirmatively extend the doctrine to this context today, we find our

---

[1] As was the case in *Geter II*, our articulation of this "factual basis" is only established here for the purpose of considering Curtis's motion for summary judgment. "The ultimate truth will be determined at trial, and we intimate no view as to whose version of the facts eventually will prevail." *Geter II*, 882 F.2d at 171 n.10.

jurisprudence in this area as applied to other constitutional protections instructive in determining whether Curtis's alleged malfeasance effectively preserved the causal chain. We explained in *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988), that "[a]n independent intermediary breaks the chain of causation unless it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant." Moreover, "[a]ny misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior." *Id.* As such, to the extent that this doctrine applies to the Fourteenth Amendment, Curtis's failure to disclose that he manipulated the lineup or that Doe's resulting testimony may have been tainted preserved the causal chain.

Accordingly, the district court correctly denied summary judgment on the Fourteenth Amendment claim. As such, the appeal as to this claim must be dismissed. *See Lytle v. Bexar County Tex.*, 560 F.3d 404, 408-09 (5th Cir. 2009) (where appellate court determines that factual dispute is material, dismissal of the interlocutory appeal is appropriate), *cert. denied*, 78 U.S.L.W. 3447 (U.S. Mar. 22, 2010) (No. 09-851).

B. Good's Fourth Amendment Claim

Much of Curtis's Fourth Amendment briefing on appeal has addressed issues well beyond the scope of our limited interlocutory review. "[W]e have jurisdiction only to decide whether the district court erred in concluding as a matter of law that officials are not entitled to qualified immunity on a given set of facts." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir.

2004) (en banc). More specifically, our review of a denial of summary judgment based on qualified immunity is limited exclusively to the question of whether "a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law." *Id.* at 346; *see also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) ("An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . ."). Accordingly, we cannot and do not reach the question of whether Good alleges a claim of false arrest or malicious prosecution nor do we address the various arguments about waiver by judicial admission or timeliness under *Wallace v. Kato*, 549 U.S. 384 (2007), in the context of this interlocutory appeal.

Turning to the questions properly before us, we conclude that Curtis is not entitled to qualified immunity on Good's Fourth Amendment claims. Contrary to Curtis's arguments, "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection – the Fourth Amendment if the accused is seized and arrested, for example . . . and some such claims may be made under 42 U.S.C. § 1983." *Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) (en banc). "As applied to the qualified immunity inquiry, the plaintiff must show that the officers could not have reasonably believed that they had probable cause to arrest the plaintiff for any crime." *O'Dwyer v.*

Nelson, 310 F. App'x 741, 745 (5th Cir. 2009) (citing *Devenpeck v. Alford*, 543 U.S. 146 (2004)). Contrary to Curtis's assertions, Good was not merely subjected to "[a]n additional lock on the door of a jail cell . . . ." Instead, the statement of undisputed summary judgment facts makes clear that Good was arrested on two different warrants on two different dates. Good was first arrested on June 15, 1983, on a bond forfeiture on a prior DWI charge. During the June 15 detention, Good was interrogated by Curtis and the photos at the heart of this case were taken. On June 18, 1983, Good was arrested for the rape and burglary of Doe on a warrant issued upon Curtis's probable cause affidavit. This second arrest forms the foundation of Good's Fourth Amendment claim. At the time he swore out the probable cause affidavit for the second arrest, Curtis had no evidence before him suggesting Good was the perpetrator other than the false identification he procured from Doe. Accordingly, Curtis could not have reasonably believed that he had probable cause to arrest Good, and the district court did not err in determining that the genuine issues of fact were material such that he is not entitled to summary judgment on qualified immunity in the instant case.[2]

---

[2] Again, we note that we do not reach the question of whether Good has stated a claim upon which relief may be granted if he has, as Curtis alleges, conceded his false arrest claim. Given our narrow jurisdiction, we merely address the dual questions of whether Curtis's conduct, as alleged, constituted a violation of Good's Fourth Amendment rights and whether a reasonable official would have known that such conduct was prohibited

IV CONCLUSION

In keeping with *Geter I* and *II*, we conclude that knowing efforts to secure a false identification by fabricating evidence or otherwise unlawfully influencing witnesses constitutes a violation of the due process rights secured by the Fourteenth Amendment. A plaintiff need not undertake the impossible task of satisfying the *Brathwaite* test where an officer's intentional conduct was designed to artificially produce precisely the sort of witness certainty that otherwise justifies the admission of suggestive lineups and the criminal defendant has been exonerated in the meantime. Moreover, we find that any reasonable official would know that framing an individual for a crime they did not commit by securing such an identification represents a constitutional violation. Accordingly, the appeal must be dismissed on his Fourteenth Amendment claim.

With respect to the Fourth Amendment, Curtis's efforts to secure Good's arrest notwithstanding the fact that Curtis affirmatively knew he manufactured probable cause constituted a clearly established violation of Good's Fourth Amendment rights at the time of the arrest such that the appeal on this claim must also be dismissed.

For the foregoing reasons, we DISMISS and REMAND.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-10341
D.C. Docket No. 3:06-CV-2133

[Filed March 23, 2010]

DONALD WAYNE GOOD,	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
FRED CURTIS, individually and in his official capacity,	)
	)
Defendant-Appellant	)
	)

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before STEWART, DENNIS, and HAYNES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the appeal is dismissed and the cause is remanded to the District Court for further proceeding in accordance with the opinion of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:06-CV-2133-K

[Filed March 26, 2009]

DONALD WAYNE GOOD,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE CITY OF IRVING, TEXAS, ET AL.,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

Before the court are: (1) Defendants The City of Irving and Fred Curtis' (collectively "Defendants") Motion for Judgment on the Pleadings and for Reconsideration Regarding Plaintiff's Claims under *Wallace v. Kato* (doc. 80); (2) Defendants' Motion for Summary Judgment (doc. 81); (3) Plaintiff Donald Wayne Good's ("Plaintiff") Motion to Strike Defendants' Affidavits for Failure to Comply with Federal Rules of Civil Procedure 56(e) (doc. 99); (4)

Defendants' Motion for Leave to Supplement Their Summary Judgment Appendix Pursuant to Federal Rules of Civil Procedure 56(e) (doc. 105); (5) Defendants' Motion for Leave to File Surreply to Plaintiff's Motion to Strike Defendants' Affidavits for Failure to Comply with Federal Rule of Civil Procedure 56(e) (doc. 111); (6) Defendants' Motion to Strike Appendix in Support of Certain Improper Evidence Submitted in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment (doc. 113); (7) Defendants' Motion for Leave to File Supplemental Briefing in Support of Their Motion for Summary Judgment Based Upon New Persuasive Authority (doc. 128); and (8) Plaintiff's Motion to Strike Defendants' Motion for Leave to File Supplemental Briefing in Support of Their Motion for Summary Judgment Based Upon New Persuasive Authority (doc. 132).

The Court **DENIES**: (1) Plaintiff's motion to strike Defendants' affidavits (doc. 99); (2) Defendants' motion for leave to file surreply (doc. 111); (3) Defendants' motion to strike appendix (doc. 113); (4) Defendants' motion for leave to file supplemental briefing (doc. 128); and (5) Plaintiff's motion to strike Defendants' motion for leave (doc. 132). The Court **GRANTS** Defendants' motion for leave to supplement their summary judgment appendix (doc. 105). The Court **GRANTS in part** Defendants' motion for judgment on the pleadings (doc. 80) and motion for summary judgment (doc. 81) because (1) Plaintiff's constitutional claims against Defendant Fred Curtis for violations of his First, Fifth, Sixth, Eighth, and Ninth Amendment rights are dismissed for failure to state a claim and (2) there is no genuine fact issue as to Plaintiff's § 1983 claims against Defendant City of Irving. The Court

also **DENIES in part** Defendants' motion for judgment on the pleadings (doc. 80) and motion for summary judgment (doc. 81) as to Plaintiff's claims for violations of his rights under the Fourth and Fourteenth Amendment as well as under Article I, Section 19 of the Texas Constitution because the Court concludes a genuine fact issue exists as to these claims.

I. Background

In the morning of June 9, 1983, Jane Doe ("Ms. Doe") and her eight-year old daughter were at their home in Irving, Texas, when a man entered the home. The intruder bound them both, with their hands behind their backs, in the living room. He then took Ms. Doe into a bedroom where he sexually assaulted her. Before he left, he took money from Ms. Doe's wallet. Ms. Doe was able to free her daughter and herself, then call 9-1-1. Irving Police Department ("IPD") responded to the call. Detective John Michaels was assigned to the case, and an investigation began. The crime scene was processed, and a rape kit was completed at Parkland Hospital where Ms. Doe had been transported.

Later that day, Ms. Doe gave a description to the Irving Police of the assailant, describing him as a white male in his twenties, 6 feet tall, weighing about 190 pounds with a medium to large build, having blondish brown hair, and being clean shaven with a dark tan. Ms. Doe then worked on a composite sketch of her attacker. Ms. Doe thought the final drawing bore a clear and unmistakable resemblance to her attacker. The composite sketch was then distributed throughout the IPD.

On June 15, Plaintiff had been arrested on an outstanding warrant for bond forfeiture in a DWI case. Defendant Fred Curtis, who was not assigned to the investigation of Ms. Doe's rape, had suspected Plaintiff to be responsible for certain unsolved daytime burglaries in Irving. Defendant Curtis brought Plaintiff to his office for the purpose of interviewing him about these unsolved burglaries. While speaking to Plaintiff, Defendant Curtis noticed a resemblance between Plaintiff and the composite sketch of Ms. Doe's attacker, which was on Defendant Curtis' desk. Defendant Curtis took a few Polaroid photographs of Plaintiff, then compiled a photographic array of suspects to show Ms. Doe.

Ms. Doe returned, with her husband, to the IPD to view the photographic lineup. (Ms. Doe had previously been shown two other photographic lineups, but failed to identify anyone in either as her attacker.) She became very emotional upon seeing Plaintiff's photograph and identified him as her attacker. The charges of aggravated rape, aggravated robbery, and burglary of a habitation against Plaintiff were added.

Plaintiff was ultimately sentenced to life imprisonment for the offenses stemming from the rape of Ms. Doe. Plaintiff served a total of 13 years, 7 months, and 5 days upon which time he was released on parole. He was, thereafter, required to register as a sex offender.

In 2001, while in custody on a parole violation, Plaintiff filed a motion for his DNA to be tested for the 1983 offense. In 2004, Plaintiff's DNA was compared to the DNA taken during the investigation, and Plaintiff was ruled out as the source of the crime scene

DNA. Plaintiff's sentence was subsequently vacated, and all charges stemming from those offenses were dismissed.

II. Legal Standards

A. Motion for Partial Judgment

Defendants have filed a motion for partial judgment under rule 12(c). The standard of review for a rule 12(b)(6) motion to dismiss also applies to rule 12(c) motions. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n. 8 (5th Cir. 2002). In considering a motion to dismiss, the court must presume all well-pleaded facts in the plaintiff's complaint to be true, and resolve any ambiguities or doubts regarding the sufficiency of their claims in their favor. *Kane Enterprises v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003); *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986). Further, the court may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of their claims which would entitle them to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, the plaintiff must plead specific facts, not mere conclusory allegations, to avoid dismissal for failure to state a claim. *Kane Enterprises*, 322 F.3d at 374; *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Dismissal is proper when "even the most sympathetic reading of [the] pleadings uncovers no theory and no facts that would subject the present defendants to liability." *Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

B. Motion for Summary Judgment

Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of identifying those portions of the record it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-25. Once a movant makes a properly supported motion, the burden shifts to the nonmovant to show the existence of a genuine fact issue for trial; but, the nonmovant may not rest upon allegations in the pleadings to make such a showing. *Id.* at 321-25; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57 (1986). The nonmovant may satisfy this burden by providing depositions, affidavits, and other competent evidence; not with "conclusory allegations, speculation, and unsubstantiated assertions." *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Neither merely colorable evidence nor a mere scintilla of evidence can defeat a motion for summary judgment. *Anderson*, 477 U.S. at 249-52. All evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

C. Qualified Immunity

A governmental employee is entitled to assert the affirmative defense of qualified immunity when he is sued for a constitutional violation under section 1983. *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992)(Fitzwater, J.). Qualified immunity protects

government officials performing discretionary functions from suit and liability for civil damages to the extent their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A law is considered to be clearly established when "the contours of a right asserted are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *White*, 959 F.2d at 544. The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341(1986).

In determining whether qualified immunity applies to a public official's actions, the court uses a two step analysis. *Hampton Co. Nat. Sur,. LLC v. Tunica Co., Miss.*, 543 F.3d 221, 224-25 (5th Cir. 2008). First, the court inquires whether, viewing the evidence in the light most favorable to Plaintiff, some evidence exists to support Plaintiff's claim of a constitutional violation. *Id.* at 225. This is a legal question. *Id.*; *White*, 959 F.2d at 544. If there is no violation of a constitutional right, the court need inquire no further. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). If there is some evidence, however, the court then inquires "'whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question.'" *Hampton*, 543 F.3d at 224-25 (quoting *Freeman v. Gore*, 483 F.3d 404, 410-11 (5th Cir. 2007)). The court looks to whether it would be clear to a reasonably competent officer that his actions violated clearly established law at the time of the incident in question. *Hampton*, 543 F.3d at 224-25.

III. Application of the Law

A. Defendant Curtis

1. First Amendment

Plaintiff makes a claim that Defendant Curtis violated his First Amendment rights. Plaintiff's Rule 7(a) reply states that Defendant Curtis violated Plaintiff's First Amendment right by fabricating evidence, providing false evidence, and failing to disclose exculpatory evidence. Plaintiff does not provide any detail as to which of his First Amendment rights were violated, or even how. In his motion to strike Defendants' motion for partial judgment, or alternatively, his response in opposition, Plaintiff states for the first time that his right to maintain intimate associations was violated by Defendant Curtis' actions. Plaintiff complains he was unable to maintain relationships with his family during his incarceration and, because he is required to register as a sex offender, he is unable to maintain any relationship with minor family members.

As Defendants correctly point out, nowhere in the Original Complaint does Plaintiff make any specific allegations regarding the alleged violation of his First Amendment rights. Neither does Plaintiff make any specific allegations in his Rule 7(a) Reply. Only in his response to Defendants' motion for partial judgment does Plaintiff attempt to expound upon his claim. Plaintiff must plead specific facts, not make mere conclusory allegations, to avoid dismissal for failure to state a claim. *Kane Enterprises,* 322 F.3d at 374; *Collins,* 224 F.3d at 498. "[E]ven the most sympathetic reading" of Plaintiff's Complaint and Rule 7(a) Reply

reveals no specific facts and no theory which would subject Defendants to any liability on his First Amendment claim; therefore, dismissal of this First Amendment claim is appropriate. *See Jacquez,* 801 F.2d at 791-92.

Even if Plaintiff had met the threshold requirements of stating a claim, the Court must conclude the affirmative defense of qualified immunity would shield Defendant Curtis. The Court cannot conclude that the constitutional right Plaintiff asserts in this case is "clearly established." A right to intimate association under the First Amendment has been recognized by the Supreme Court. *Roberts v. United States Jaycees,* 468 U.S. 609, 617-18 (1984). However, courts to-date have not decided whether this right applies to convicted persons later exonerated. In conducting a qualified immunity analysis, the court looks to whether the defendant violated a clearly established federal law at the time he acted. *See Hampton,* 543 F.3d at 224-25; *see also McClendon,* 258 F.3d at 438. The Court cannot conclude that Defendant Curtis acted in such a way as to violate a clearly established constitutional right of Plaintiff at the time of the incident.

Accordingly, the Court **dismisses** Plaintiff's First Amendment claims for failure to state a claim.

2. Fifth Amendment Claim

Plaintiff alleges Defendant Curtis violated his Fifth Amendment right to due process. The Court must determine whether Plaintiff's allegations rise to the level of a constitutional deprivation as it relates to his Fifth Amendment right.

The Fifth Amendment's due process clause and the protections it affords apply only to violations by the United States or a federal actor. *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000)(*citing Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996)("[T]he Fifth Amendment applies only to the actions of the federal government, and not to the actions of a municipal government[.]")); *Knoetze v. U.S., Dept. of State*, 634 F.2d 207, 211 (5th Cir. 1981)("[F]ifth amendment protection attaches only when the federal government seeks to deny a liberty or property interest."); *see Hazleton v. City of Grand Prairie, Tex.*, 8 F.Supp.2d 570, 578 (N.D. Tex. 1998)(Solis, J.). Plaintiff does not plead that either Defendant was a federal actor or that either acted under federal law. Because the Fifth Amendment's protections do not contemplate the kind of injury alleged, the Court finds Plaintiff has failed to state a claim upon which relief may be granted. The Court dismisses this claim. *See Morin*, 77 F.3d at 120 (district court should have dismissed the plaintiff's Fifth Amendment claim because that constitutional provision does not protect an individual from the type of harm plaintiff claimed).

3. Sixth Amendment Claim

Plaintiff asserts a claim that Defendant Curtis violated his rights to a fair trial under the Sixth Amendment. Specifically, Plaintiff contends this right was violated when Defendant Curtis fabricated false evidence and made misrepresentations based on that false evidence to prosecutors.

A fair trial claim as asserted by Plaintiff has not been recognized in this district nor in the Fifth Circuit. Indeed, in *Castellano v. Fragozo*, 352 F.3d 939 (5th

Cir. 2003)(en banc), the Fifth Circuit held that the state's action of manufacturing evidence was a violation of due process under the Fourth Amendment. *Id.* at 956-57. The only cases in which this type of claim has been recognized are out of the Second Circuit. *See Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123 (2nd Cir. 1997); *Mitchell v. Home*, 377 F.Supp.2d 361 (S.D.N.Y. 2005); *see also Rolon v. Henneman*, 443 F.Supp.2d 532 (S.D.N.Y. 2006). Based on prior Fifth Circuit caselaw, the Court is confident the Fifth Circuit would not recognize this specific cause of action as cognizable.

Even if this Court did recognize this as a cognizable action, the Court concludes this case does not fall within the parameters set forth by the Second Circuit. In *Ricciuti*, the plaintiffs alleged the defendant-police officers fabricated a confession by plaintiff, Alfred Ricciuti, after he had been arrested, which was then provided to the prosecutors office. This supposed confession contained racial epithets, which elevated the offense for which plaintiffs were charged, as well as caused the prosecutor to add an additional charge. The Second Circuit held that a police officer's fabrication of evidence likely to influence a jury and subsequent disclosure of that to the prosecutor violates the accused's right to a fair trial. *Id.* at 130. Fabricating evidence and forwarding the false evidence by an officer corrupts "'the truth-seeking function of the trial process.'" *Id.* at 129 (quoting *U.S. v. Agurs*, 427 U.S. 97, 104 (1976)).

The facts in *Ricciuti* are distinguishable, however. In *Ricciuti*, the defendant-officers fabricated the evidence after the plaintiffs had been arrested. In this case, the allegedly fabricated evidence, the suggestive

photographic lineup, was created before Plaintiff's arrest in a supposed attempt to make him out to be the rapist. This difference in pre-arrest versus post-arrest fabrication was noted in *Rolon*. *Id.*, 443 F.Supp.2d at 532. In that case, the district court explained that a pre-arrest manufacture of false evidence implicates an individual's due process rights under the Fourth Amendment, rather than a post-arrest fabrication, which would invoke an individual's right to a fair trial under the Sixth Amendment. *Id.* at 539 (citing *Zahrey v. Coffey*, 221 F.3d 342, 349 (2nd Cir. 2000)). This Court agrees with the *Rolon* court's distinction. The trial process had not been affected, as Plaintiff had not yet been arrested and charged with the offenses against Ms. Doe when Defendant Curtis' allegedly acted in a way to violate Plaintiff's rights. Because this case involves alleged pre-arrest fabrication of evidence, the Court concludes Plaintiff's due process rights under the Fourth Amendment would be implicated rather than his right to a fair trial under the Sixth Amendment.

The Court concludes Plaintiff's Sixth Amendment claim is not a cognizable claim as recognized by any authority binding to this Court and hereby dismisses it. Regardless, even if the Court were to recognize such a claim, it does not fit within the dictates set forth by the Second Circuit, which has previously recognized this cause of action. The Court **dismisses** this claim.

4. Eighth Amendment Claim

Plaintiff also asserts a claim that Defendant Curtis violated his rights under the Eighth Amendment. Again, the Court must determine whether Plaintiff's

allegations rise to the level of a constitutional deprivation.

The protection against cruel and unusual punishment under the Eighth Amendment applies only to convicted persons. *See Morin*, 77 F.3d at 120. The record establishes that Plaintiff's Eighth Amendment claims relate to actions or conduct which occurred prior to his conviction. Accordingly, Plaintiff's pleadings do not implicate the Eighth Amendment and its protections. Therefore, Plaintiff has failed to state a claim upon which relief may be granted for his Eighth Amendment claims. The Court dismisses this claim. *See Morin*, 77 F.3d at 120.

5. Ninth Amendment Claim

Plaintiff also alleges his Ninth Amendment rights were violated by Defendant Curtis. The Court must determine whether Plaintiff's allegations rise to the level of a constitutional deprivation.

Just as with certain other of Plaintiff's claims, no where in his Original Complaint does Plaintiff make any specific allegations regarding the alleged violation of his Ninth Amendment rights. Plaintiff must plead specific facts, not make mere conclusory allegations, to avoid dismissal for failure to state a claim. *Kane Enterprises*, 322 F.3d at 374; *Collins*, 224 F.3d at 498. "[E]ven the most sympathetic reading" of Plaintiff's Complaint reveals no specific facts and no theory which would subject Defendants to any liability, so dismissal of this Ninth Amendment claim is appropriate. *See Jacquez*, 801 F.2d at 791-92. Plaintiff has failed to state a claim related to his Ninth Amendment claims.

Even if Plaintiff had sufficiently plead this claim, it would fail as a matter of law. The Ninth Amendment is not recognized by courts as an independent basis for securing any constitutional right in a civil trial, more specifically in a section 1983 case. *See Strandberg v. City of Helena*, 791 F.2d 744, 748-49 (9th Cir. 1986)(Ninth Amendment not recognized as independently securing any constitutional right, and section 1983 claims must be premised on specific constitutional violation); *Lloyd v. Lee*, 570 F.Supp.2d 556, 566 (S.D.N.Y. 2008)(Ninth Amendment cannot be basis for section 1983 claim which must be premised on specific constitutional violation); *Clynch v. Chapman*, 285 F.Supp.2d 213, 218-19 (D. Conn. 2003)(Ninth Amendment cannot be basis for section 1983 claims because it is merely a rule of construction, not a source of constitutional rights); *Grant v. John Hancock Mut. Life Ins. Co* , 183 F.Supp.2d 344, 362 (D. Mass. 2002); *Mann by Parent v. Meachem*, 929 F.Supp. 622, 634 (N.D.N.Y. 1996)(Ninth Amendment recognized as rule of construction, not enumerating certain constitutional right, and section 1983 claims must be based on specific constitutional guarantee); *see also Froehlich v. State, Dept. of Corrections*, 196 F.3d 800, 801 (7th Cir. 1999)(Ninth Amendment rule of interpretation, not source of constitutional rights); *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991)(Ninth Amendment not independent basis for seeking constitutional claims). Following these courts, this Court concludes the Ninth Amendment cannot independently secure any constitutional right. Consequently, Plaintiff's Ninth Amendment claims are hereby dismissed.

6. Fourth and Fourteenth Amendment Claims

Plaintiff argues his Fourth Amendment rights were violated when, without probable cause, he was charged with the rape and burglary of Ms. Doe. Plaintiff claims his rights to a fair trial, not to be deprived of liberty, and due process were violated when Defendant Curtis manufactured evidence to obtain a wrongful conviction, failed to disclose exculpatory evidence, conducted an investigation with no regard for his innocence, or fabricated evidence. These claims center on the photographic lineup compiled by Defendant Curtis from which Ms. Doe identified Plaintiff as her rapist.

Defendant Curtis maintains the photographic lineup was not unduly suggestive, but even if it was, it did not give rise to a substantial risk of misidentification. Plaintiff argues Defendant Curtis was angered by Plaintiff's refusal to answer questions about unsolved (and unrelated) burglaries in Irving. In retaliation for Plaintiff refusing to cooperate, Plaintiff argues that Defendant Curtis purposefully darkened, or underexposed, the photograph of Plaintiff in order to make Plaintiff resemble the composite sketch of Ms. Doe's rapist. In support of his response to Defendants' motion for summary judgment, Plaintiff provides his affidavit in which he states that Defendant Curtis threatened to "fix it" so Plaintiff would match the composite sketch of the rapist, then deliberately darkened the photograph of Plaintiff which Defendant Curtis used in the photographic lineup.

If an identification procedure is "'unnecessarily suggestive and conducive to irreparable mistaken identification,'" it violates the individual's rights to due

process. *U.S. v. Atkins*, 698 F.2d 711, 713 (5th Cir. 1983)(quoting *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967)(*abrogated on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987))). The intentional use of unduly suggestive identification procedures can support a section 1983 action. *Geter v. Fortenberry*, 882 F.2d 167, 170-71 (5th Cir. 1989). Based on the summary judgment evidence, the Court concludes genuine issues of material fact exist on Plaintiff's Fourth and Fourteenth Amendment claims, specifically whether the photographic lineup was unduly suggestive. Because some evidence exists to support these claims, the Court concludes there are also genuine issues of material fact as to whether Defendant Curtis is entitled to qualified immunity on these claims. Furthermore, the Court does not find persuasive Defendants' argument that collateral estoppel should apply, particularly in light of the fact that no binding authority on this issue exists.

Therefore, the Court **denies** Defendants' motion for partial judgment and motion for summary judgment as it relates to these claims, as well as to whether Defendant Curtis is entitled to qualified immunity.

B. Defendant City of Irving

Plaintiff contends Defendant City of Irving ("City") had a custom, policy, or practice which denied him his constitutional rights, and to which the City was deliberately indifferent. Specifically, Plaintiff alleges in his complaint that the City had a policy, practice, and custom of (1) "failing to properly train and supervise officers in the techniques of investigating serious crimes," (2) "investigating crimes in a manner

designed to prove a case against a convenient suspect by procuring unreliable evidence and, if necessary, disregarding reliable evidence when that evidence did not comport with a particular theory of the case," and (3) "failing to discipline officers who violate the Constitution or law, or otherwise transgress the rights of criminal suspects during their investigations." Plaintiff argues the City maintained these policies or customs displaying deliberate indifference to the constitutional rights of people, such as Plaintiff, and this directly resulted in his constitutional rights being violated.

A plaintiff may pursue a section 1983 claim against a municipality. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). But the burden for establishing municipal liability under § 1983 is stringent. *See Atkins v. City of Carrollton*, 1997 WL 160297, at *3 (N.D. Tex. March 27, 1997)(Fitzwater, J.). Evidence must establish "(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom)." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). An "official policy" is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a

> custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). If a plaintiff attempts to establish an official policy based on the existence of an informal but "persistent, widespread practice of city officials or employees," he must establish both the existence of the practice and actual or constructive knowledge of this practice on the part of the governmental body or the officials to whom the body has delegated policymaking authority. *See Atkins*, 1997 WL 160297, at *4.

a) Policy on Photographic Lineups

The Court first addresses Plaintiff's allegations related to the inadequacies of the City's policies in that it failed to develop a policy on photographic lineups, although it had a detailed operating procedure for live lineups. Plaintiff contends the City's failure to institute a policy for a photographic lineup was done with deliberate indifference and created an environment for Defendant Curtis to commit the constitutional violations at issue. Plaintiff makes this argument for the first time in his response to Defendants' motion for summary judgment. None of the claims in his complaint address the City's alleged failure to institute a policy related to photographic lineups or lack thereof. A plaintiff cannot assert a new

claim in a response to a summary judgment motion; therefore, this specific claim should be dismissed. *See Curtis v. Arapaho Venture Ltd.*, 2004 WL 2248236, at *5 (N.D. Tex. Oct. 5, 2004)(Sanders, J.)(quoting *Woods Arts Golf, Inc. v. Callaway Golf Co.*, 196 F.Supp.2d 467, 469 n. 1 (S.D. Tex. 2002)).

b) Investigation of Crimes and Discipline of Officers

Plaintiff claims the City also had a custom, policy or practice of investigating crimes, procuring unreliable evidence and disregarding reliable evidence, as well as failing to discipline officers who violated suspects' rights.

Because Plaintiff points to no policy statement, ordinance, regulation or decision which was officially adopted and promulgated related to these claims, he must establish a "persistent, widespread practice." To prove an official policy based on a "persistent, widespread practice" of city employees or officials, Plaintiff must establish the existence of the practice and actual or constructive knowledge of the governing body or person(s) to whom official policymaking authority has been delegated by the governing body. *See Atkins*, 1997 WL 160297, at *3.

The Court concludes Plaintiff failed to establish the second element of his burden of establishing actual or constructive knowledge. In his Original Complaint, Plaintiff claims that the Chief of the Irving Police Department "is the final policy-maker for the police department." A city's employee is not the policymaker unless exclusive policymaking authority has been delegated to that employee by its lawmakers. *See City*

of St. Louis v. Prapotnik, 485 U.S. 112, 124 (1988). It is Plaintiff who bears the burden of establishing a genuine issue of material fact exists as to whether the City's governing body has delegated policymaking authority to lower ranking city officials, in this case the Chief of the Irving Police Department. *See Atkins*, 1997 WL 160297, at * 4. Without any evidence to the contrary, the Court must assume the City's policymaking authority lies with the City's governing body. *See id.*; *see also Prapotnik*, 485 U.S. at 126 (applicable law dictates where the municipality's policymaking authority lies and the federal court may not assume it lies anywhere else).

To meet his burden, Plaintiff's evidence must establish that the governing body of the City had actual or constructive knowledge of an official policy or custom of the City's employees of ratifying or authorizing the unlawful practices of which Plaintiff complains, namely failing to discipline officers who violate the Constitution or law and investigating crimes resulting in the conviction of innocent persons. Plaintiff provided no summary judgment evidence of the official policymaker of the City; consequently, there can be no proof that the governing body of the City had actual knowledge of any unconstitutional practice or policy. *See Atkins*, 1997 WL 160297, at *4 5. Likewise, there can be no evidence that the governing body of the City had constructive knowledge of the alleged unconstitutional policies and practices. *See id.* at *4 Plaintiff has failed to meet his burden to show a genuine fact issue that it was the official custom, policy or practice of the City to fail to discipline officers who violate the Constitution or law and to investigate crimes without regard to the reliability of evidence.

The Court dismisses these claims against the City.

c) Failure to Train

Plaintiff also contends the City failed to properly train and supervise its officers in the proper investigation of serious crimes, and the City was deliberately indifferent to the rights of innocent persons and violations by its officers.

The Supreme Court held that inadequate police training may provide a basis for liability under § 1983 "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). The municipality's policies must be the moving force causing the constitutional violation. *Id.* at 389. For a municipality to be liable for failure to train, the failure to train must be a "'deliberate'" or "'conscious'" decision by the municipality. *Id.* Deliberate indifference is a stringent standard; it is more than negligence or even gross negligence. *See Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381-82 (5th Cir. 2005). The plaintiff must establish "a pattern of violations and that the inadequacy of the training is 'obvious and obviously likely to result in a constitutional violation.'" *Id.* (quoting *Cousin v. Small*, 352 F.3d 627, 637 (5th Cir. 2003). The pattern should be of similar violations, not any and all bad acts . *Id.* at 383.

The Court considers this claim separately from the other federal claims against the City because some courts have found a single violation may provide the basis for municipal liability on a failure-to-train claim. *See Atkins*, 1997 WL 160297, at * 4 (citing *Bennett v.*

City of Slidell, 728 F.2d 762, 768 n. 3 (5th Cir. 1984)). Although, the Fifth Circuit is reluctant to apply the single incident exception, noting that proof of a single incident is usually not sufficient to impose municipal liability. *See Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000).

Plaintiff failed to provide evidence sufficient to establish a genuine issue of material fact related to the adequacy of the City's training program or that the inadequate training was the cause in fact of Plaintiff's injury. The Supreme Court held that a plaintiff must identify a specific deficiency in the municipality's training and either (1) a pattern of constitutional violations about which the final policymaker knew or (2) training is obviously required to avoid constitutional violations. *Canton*, 489 U.S. at 690. A plaintiff must also prove that this specific training deficiency was the actual cause of the plaintiff's constitutional injury. *Id.* at 690-91. However, a plaintiff's allegation or even showing that a particular officer was inadequately trained will not suffice to impose liability on the municipality. *Id.*

As previously addressed, Plaintiff failed to adduce any evidence of the final policymaker; therefore, there can be no showing of what the final policymaker knew, and no showing of a deliberate or conscious choice made by the policymaker related to these training programs. In addition, Plaintiff's allegations revolve around Defendant Curtis and the City's failure to train and supervise him. Plaintiff failed to adduce competent summary judgment evidence that the City's training in general was inadequate; therefore, he did not meet his burden. *Id.* Plaintiff's summary judgment evidence does not create a genuine fact issue.

Even if Plaintiff had sufficiently identified a deficiency in the City's training program, Plaintiff failed to adduce evidence that his injury was the direct result of the inadequate training program. Interestingly, Plaintiff argues in his pleadings that Defendant Curtis purposefully darkened, or underexposed, his Polaroid photograph in retaliation for Plaintiff refusing to cooperate with Defendant Curtis' questioning. This undermines any argument Plaintiff could make that his injury directly resulted from the City's inadequate training as opposed to a possible "bad apple" the City may have hired.

For the Court to apply the single incident exception, Plaintiff must establish that the "'highly predictable' consequence" of the failure to train would cause in injury Plaintiff suffered, and that the failure to train was the "'moving force'" causing the constitutional violation. *Estate of Davis*, 406 F.3d at 385-86. The Fifth Circuit pointed out "'there is a difference between a complete failure to train and a failure to train in one limited area.'" *Id.* (quoting *Cozzo v. Tangipahoa Parish Council–President Government*, 279 F.3d 273, 288 (5th Cir. 2002)). Plaintiff complains in this case about a failure to train in one area–photographic lineups. Based on the evidence in the record, the Court concludes the "single incident exception" does not apply in this case.

The Court concludes Plaintiff has failed to meet the stringent burden set forth in *Canton* as to his failure to train claim. The Court also concludes Plaintiff failed to adduce any evidence of who or what governing body is the City's final policymaker as required for the remainder of his claims against the City. Therefore,

the Court concludes summary judgment is appropriate for Plaintiff's federal claims against the City.

C. State Law Claims

Plaintiff has also asserted claims against Defendants Curtis and the City pursuant to Art. I, Section 19 of the Texas Constitution. The Court has supplemental jurisdiction over this claim under 28 U.S.C. § 1367(a). Article I, Section 19 addresses due process rights under the state constitution. The Court has already determined that the summary judgment evidence reveals issues of material fact exist for the factfinder as it relates to Plaintiff's federal due process claims. The Court concludes the same for this state claim. *See Jeffrey v. Board of Trustees of Bells ISD*, 261 F.Supp.2d 719, 727 (E.D. Tex. 2003). Therefore, the Court **denies** summary judgment as to Defendants Curtis and the City on this state constitutional claim.

IV. Conclusion

The Court dismisses Plaintiff's claims as to Defendant Curtis for violations of Plaintiff's First, Fifth, Sixth, Eighth and Ninth Amendment rights. The Court grants summary judgment on Plaintiff's federal and state claims against Defendant City because Plaintiff failed to establish the City had an "official policy" which worked to deprive Plaintiff of his constitutionally protected rights.

The Court concludes fact issues remain as to whether the Defendant Curtis' actions, related to the photographic lineup, violated Plaintiff's Fourth and Fourteenth Amendment due process rights, as well as his due process rights under the Texas Constitution

not to be arrested or charged without probable cause. Specifically, questions remain whether Defendant Curtis manufactured or falsified evidence so that, without probable cause, Plaintiff was charged with and convicted of the offenses against Ms. Doe. Accordingly, the Court denies summary judgment as to Defendant Curtis on Plaintiff's claim for state constitutional due process violations. The Court denies summary judgment on Plaintiff's claims for Fourth and Fourteenth Amendment due process violations as to Defendant Curtis, as well as whether Defendant Curtis is entitled to qualified immunity.

SO ORDERED.

Signed March 26th, 2009.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
282ND JUDICIAL DISTRICT

CAUSE NO. 83-01435-JS

[Filed December 15, 1983]

STATE OF TEXAS	)
	)
-vs-	)
	)
DONALD WAYNE GOOD	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON IDENTIFICATION TESTIMONY

Defendant having moved the Court to conduct a hearing outside the presence of the jury to determine the admissibility of the in-court identification by the witness, and the Court having heard such testimony outside the presence of the jury, the Court makes the following findings;

That the above witness has identified the defendant in this cause as being the person who committed the offense charged in the indictment herein;

That the above witness testified to having identified the defendant in a photographic lineup and

again in a "live" lineup, each conducted by law enforcement authorities;

That said photographic lineup was not suggestive in its composition nor in the manner in which it was conducted;

That said "live" lineup was not suggestive in any way;

That the said in-court identification was not influenced either by the witness having seen said photographs of the defendant or by the witness having viewed the defendant in said "live" lineup.

That said in-court identification was based solely on the witness having viewed the defendant at the time and place where the offense is alleged to have been committed;

That said in-court identification is admissible before the jury in this cause;

That testimony concerning the witness identifying the defendant in the photographic lineup and in the "live" lineup is admissible before the jury in this cause;

That all these findings are made under the evidence adduced at said hearing outside the presence of the jury and are made by the Court beyond a reasonable doubt.

/s/ Kelly Loving
KELLY LOVING, Judge

No. 09-1559

Supreme Court, U.S.
FILED
JUL 22 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRED CURTIS,

Petitioner,

v.

DONALD WAYNE GOOD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK S. WERBNER
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QUESTION PRESENTED

Whether a police officer is entitled to an affirmative defense of qualified immunity against a violation of rights secured by the Fourteenth Amendment when he framed a defendant by manipulating a photo for a photographic lineup in order to procure a false identification from the victim in retaliation against the defendant, and whether such a violation was clearly established and illegal at the time the officer acted.

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INTRODUCTION

This case concerns a matter in which a criminal defendant has been exonerated of a conviction based on DNA evidence as a result of a wrongful conviction because a police officer deliberately framed the defendant. Donald Wayne Good (hereinafter referred to as "Respondent") brought a suit under 42 U.S.C. §1983 against Fred Curtis (hereinafter referred to as "Petitioner"), alleging that Petitioner violated his rights under the Fourth Amendment and Fourteenth Amendment when he told Respondent that he was going to "fix it" so Respondent would be framed for a crime that he did not commit, and Petitioner did so by manipulating a photographic lineup, fabricating probable cause, lying under oath, and failing to disclose all exculpatory evidence to the prosecutor, the judge, and the jury as to his illegal conducts.

Petitioner took an interlocutory appeal from the district court's denial of his motion for summary judgment on the basis of qualified immunity. The only issue before the Fifth Circuit court was whether Petitioner was entitled to qualified immunity with regard to the alleged violations of Respondent's Fourth and Fourteenth Amendment rights. Petitioner's Writ of Certiorari, Appendix ["Pet. App."] 2a. The Fifth Circuit court, following a well-reasoned analysis and in accordance with the ruling from the district court, stated that because genuine issues of material fact exist regarding Petitioner's conduct, Petitioner must be denied qualified immunity. Pet. App. 1a-15a. In

complete agreement with the district court, the Fifth Circuit dismissed the appeal. *Id.*

Petitioner should not be entitled to qualified immunity because Respondent has met his burden by alleging and providing sufficient summary judgment evidence to show: 1) Petitioner stated that he planned to frame Respondent for failing to cooperate; 2) Petitioner artificially manipulated Respondent's photograph to conform to composite sketch and description of Doe's assailant by darkening the picture; and 3) Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's non-cooperation regarding an unrelated crime. Pet. App. 10a. Simply put, Petitioner, in retaliation, framed Respondent for a crime that he did not commit. Any reasonable official would know that framing an individual for a crime they did not commit by securing false identification, fabricating probable cause, lying under oath, and failing to disclose exculpatory evidence to the prosecutors, the judge, or the jury presents a constitutional violation. Accordingly, Petitioner is not entitled to qualified immunity.

COUNTERSTATEMENT OF THE CASE

On June 18, 1983, Respondent was arrested and charged with aggravated rape, aggravated robbery, and burglary of a habitation. After three trials, Respondent was wrongfully convicted and sentenced to

life imprisonment. Respondent served thirteen years, seven months, and five days in prison and was finally exonerated by DNA evidence on December 22, 2004. Pet. App. 2a; *Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004).

On June 9, 1983, a man entered the Irving, Texas home of Jane Doe where he bound her and her eight year old daughter and brutally raped Jane Doe.[1] After Jane Doe was able to free herself and her daughter, she contacted the Irving Police Department, and the crime scene was subsequently processed for evidence. As a part of the investigation, a rape kit was prepared and Jane Doe gave a description of her assailant to the police. Jane Doe described her assailant as a white male in his twenties, six feet tall, about 190 pounds, clean shaven, with a medium to large build, blondish-brown hair, and dark tan skin tone. Based on Jane Doe's description a composite sketch of the assailant was prepared and distributed throughout the Irving Police Department.

On June 15, 1983, Respondent was arrested in an unrelated incident stemming from a prior DWI charge. Petitioner suspected that Respondent was responsible for certain unsolved daytime burglaries in Irving, brought Respondent to his office and started to interview him regarding the daytime burglaries. During

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[1] Due to privacy concerns, throughout the course of this litigation both parties have agreed to refer to the victim of the June 9, 1983 rape as "Jane Doe."

the interview, Petitioner became irate because Respondent was not cooperating with him. Petitioner, who was not assigned to the investigation of Jane Doe's rape, pulled out a copy of the composite sketch in the Doe case and informed Respondent that he looked like the assailant, and if Respondent thought that he did not look like the assailant, Petitioner would "fix it" in a manner that Respondent would match the assailant.

Respondent refused to answer any questions, and Petitioner told Respondent that he was going to charge him with Doe's rape. Next, Petitioner took Respondent outside of his office and proceeded to take several pictures of him with a Polaroid camera. Petitioner repeatedly altered the light setting on the camera with each picture in an effort to make Respondent's photograph better match the "dark tan" skin of the assailant. Petitioner intentionally did not use a prior picture of Respondent that was taken at the time of the booking, but instead altered a Polaroid photograph of Respondent in creating a photographic lineup. Petitioner was successful only in obtaining Jane Doe to identify Respondent as the assailant; Jane Doe's daughter did not identify Respondent as the assailant. Petitioner prepared a probable cause affidavit, and Respondent was arrested on June 18, 1983, and charged with aggravated rape, aggravated robbery, and burglary of a habitation.

Respondent's first criminal trial ended in a hung jury, and his second trial resulted in a guilty verdict. The guilty verdict was later overturned because

of prosecutorial misconduct unrelated to the photographic lineup. *Good v. State*, 723 S.W.2d 734 (Tex. Crim. App. 1986). The State of Texas tried Respondent for a third time, and Respondent was convicted of burglary of a habitation with intent to commit rape. Petitioner testified at all trials and was the key witness for the prosecutor. Petitioner never disclosed to the prosecutors, the judge, Respondent's attorney, or the jury that he had told Respondent that he would "fix it" if Respondent did not cooperate with him or that he had altered Respondent's photo.

In 2001, the Dallas County Criminal District Court Number 3 granted Respondent's motion for post-conviction DNA testing, and the DNA test ruled Respondent out as Doe's assailant. Based on this new evidence, the Texas Court of Criminal Appeals granted Respondent's habeas petition and vacated his sentence. *Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004). On December 22, 2004, all charges against Respondent were dismissed.

On November 17, 2006, Respondent filed a complaint in the United States District Court for the Northern District of Texas against City of Irving, Irving Police Department, the Chief of the Police for the City of Irving, individually and in his official capacity, and Petitioner, individually and in his official capacity under 42 U.S.C. §1983 for alleged violation of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Texas Constitution.

In March 2007, the District Court dismissed all claims against the Irving Police Department, the Irving Chief of Police, in his official and individual capacity, and Petitioner, in his official capacity. On June 1, 2009, the District Court also dismissed all claims against the City of Irving and claims against Petitioner, in his individual capacity, based on alleged violations of Respondent's First, Fifth, Sixth, Eighth, and Ninth Amendment rights. However, the District Court did not entirely dismiss Respondent's case. The District Court denied Petitioner's motion for partial judgment on the pleadings and motion for summary judgment as to Respondent's claims based on alleged violations of the Fourth and Fourteenth Amendments as well as Article I, Section 19 of the Texas Constitution, ruling that genuine issues of material fact exist as to whether Petitioner was entitled to qualified immunity. Pet. App. 32a-33a, 41a.

Petitioner filed an interlocutory appeal with regard to Petitioner's qualified immunity defense in connection with Respondent's claim under the Fourth and Fourteenth Amendments. On February 18, 2010, the Fifth Circuit denied Petitioner's appeal. Petitioner filed a motion for rehearing, and on March 23, 2010, the Fifth Circuit Court denied Petitioner's motion for rehearing and issued an Opinion. *See Good v. Curtis*, 601 F.3d 393 (5th Cir. 2010); *see also* Pet. App. 1a-15a. On April 8, 2010, Petitioner filed his Motion To Stay Issuance of Mandate For 90 Days Pending Filing of Petition for *Writ of Certiorari*. The Fifth Circuit automatically granted Petitioner's Motion To Stay

Issuance of Mandate and gave him until June 23, 2010, to file his *Writ of Certiorari* to the United States Supreme Court. On June 21, 2010, Petitioner filed his Petition for *Writ of Certiorari* to this Honorable Court. *See generally* Petitioner's Writ of Certiorari ["Pet."].

REASONS FOR DENYING THE PETITION

Throughout this litigation, Petitioner has attempted to change the focus of the actual issue in this case: Respondent presented sufficient summary judgment evidence to show that Petitioner's acts were intentional and that he purposefully wanted to "fix it" so Respondent would get framed for a crime that he did not commit, and Petitioner acted upon these intentions.

Petitioner has repeatedly attempted to recharacterize the facts in this case, arguing that the issue is as limited as to whether the photographic lineup was unduly suggestive; Petitioner, however, fails to recognize that the evidence has established that Petitioner said he would frame Respondent, acted on his promise, signed a false document, and failed to disclose the truth to the prosecutor and the judge. Pet. App. 10a. When taking all facts in the light most favorable to Respondent, both the trial court and the Fifth Circuit have agreed that there is sufficient summary judgment evidence to show that Respondent's rights were violated, and thus, there is no

qualified immunity protection available to Petitioner at this time as a matter of law, and whether Petitioner is entitled to qualified immunity is a question for the fact finder. Pet. App. 7a-15a.

As the Court of Appeals for the Fifth Circuit has previously held, "a police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means . . . for such activity violates clearly established constitutional principles." *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988) ("*Geter I*"). Further, when an individual has presented evidence as to which witnesses were encouraged to give false identifications and what means were used to encourage the witnesses to wrongly identify the individual, courts are in agreement that such evidence is sufficient to create genuine issues of material fact to overcome qualified immunity. *See Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989) ("*Geter II*"); *Good v. Curtis*, 601 F.3d 393 (5th Cir. 2010).

I. The Fifth Circuit Was Correct In Dismissing Petitioner's Appeal and Ruling That Respondent's Constitutional Rights Were Violated by Petitioner

Respondent's Fourteenth Amendment rights were violated when Petitioner manipulated his picture and created an inaccurate photo lineup in an effort to procure a false identification; specifically, when: 1) Petitioner told Respondent that he was going to

"fix it" in a manner that Respondent would match the assailant; 2) took the overt act of manipulating a Polaroid photograph of Respondent to make it darker; 3) intentionally did not use a prior picture of Respondent that was taken at the time of the booking; 4) interjected himself into an investigation not assigned to him; 5) prepared a probable cause affidavit and signed under oath; 6) failed to disclose exculpatory evidence to the prosecutor, judge, or the jury; and 7) lied under oath at trial.

Petitioner relies on cases involving the application of test when there is allegations regarding suppression of evidence and, therefore, the resulting identification may be questionable. A misidentification or "suggestive lineup" suppression tests, to be applied where a police officer deliberately and intentionally procures a false identification by an unlawful means, is simply inapplicable to the facts involved in this matter. *See Manson v. Brathwaite*, 432 U.S. 98 (1977) ("The standard for evaluating the admissibility of identification evidence focuses on whether the identification procedure was unduly suggestive and whether the resulting identification is reliable."); *see also Alexander v. City of South Bend*, 433 F.3d 550 (7th Cir. 2006) (Applying *Braithwaite* test focusing on whether unduly suggestive identification techniques tainted the trial.). Very different than suppression of evidence, this is a case where the facts indicate that Petitioner deliberately "framed" a criminal defendant based on the manufacturing and manipulation of evidence. The Fifth Circuit correctly

stated that a police officer who knowingly secures a false identification by fabricating evidence is not entitled to qualified immunity. Pet. App. 14a. As further outlined by the Fifth Circuit, Respondent has clearly met his burden by alleging and providing sufficient summary judgment evidence to show: 1) Petitioner stated that he planned to frame Respondent for failing to cooperate; 2) Petitioner artificially manipulated Respondent's photograph to conform to composite sketch and description of Doe's assailant by darkening the picture; and 3) Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's non-cooperation regarding an unrelated crime. Pet. App. 10a.

Moreover, section 1983 provides a remedy to Plaintiffs who have been denied their Fourteenth Amendment due process right to a fair trial. *See Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003). In *Castellano*, the court held that "a state's manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause." *Id.* Wrongfully convicted persons have successfully brought claims in several circuits based on law enforcement officials' manufacturing evidence to obtain a wrongful conviction, failure to disclose exculpatory evidence, conducting an investigation that recklessly or intentionally disregards the innocence of the accused or a third party's guilt, or fabricating evidence. *See id.* at 955; *see also McMillian v.*

W.E. Johnson, 88 F.3d 1554 (11th Cir. 1996); *Wilson v. Lawrence County, Mo.*, 260 F.3d 946, 956 (8th Cir. 2001); *Spurlock v. Satterfield*, 167 F.3d 995, 1005 (6th Cir. 1999).

In the case at bar, Respondent's constitutional rights have been violated by Petitioner. Respondent has presented evidence showing that Petitioner stated that he planned to frame Respondent for failing to cooperate with him, Petitioner artificially manipulated Respondent's photo to match to the composite sketch and description of the victim's assailant by darkening the picture, and Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's refusal to cooperate regarding a wholly unrelated crime. Petitioner fabricated and manufactured evidence and knowingly used it along with his perjured testimony to obtain a wrongful conviction, thus depriving Respondent of his long recognized right to a fair trial secured by the Due Process Clause. U.S. CONST. amend. XIV. Based on the substantial evidence that Petitioner acted to intentionally violate Respondent's constitutional rights, the Fifth Circuit correctly ruled that "qualified immunity generally protects 'all but the plainly incompetent or those who knowingly violate the law.'" Pet. App. 11a (citing *Malley v. Briggs*, 475, U.S. 335, 351 (1986).

II. There Is No Split Among The Circuits: A Police Officer Is Not Entitled to Qualified Immunity Under the Facts Present in This Matter

It has been well established that a police officer is not entitled to qualified immunity when he knowingly secures a false identification by fabricating evidence or otherwise unlawfully influences a witness. *See Devereaux v. Abbey*, 263 F.3d 1070, 1075, (9th Cir. 2001) (en banc) ("[W]e are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on basis of false evidence that was deliberately fabricated by the government."); *Brewer v. Shasta County*, 27 F. App'x 908, 912-13 (9th Cir. 2001) (unpublished) (applying *Devereaux* where "the detectives used suggestive procedures with the intent of obtaining an identification of [the plaintiff], irrespective of whether he was in fact guilty"). Petitioner argues that his fabrication of evidence, *by itself*, does not implicate or violate Respondent's due process rights, and based on this position, there is a split amongst Circuits. Pet. 12-27 (emphasis added). As a result, Petitioner asserts that the Fifth Circuit Court's holding widened an already existing split among the circuits, and last year, the Supreme Court saw fit to address this issue, but was not able to because the case was settled prior to its decision. *Id.* Petitioner's argument is misplaced under the facts of this case, and simply incommensurable, as many of the cases cited by Petitioner do not address the issue of qualified immunity of a police

officer. *See generally Alexander v. City of South Bend*, 433 F.3d 550 (7th Cir. 2006); *Landrigon v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *Zahrey v. Coffey*, 221 F.3d 342, 351-54 (2d Cir. 2000); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Michaels v. McGrath*, 531 U.S. 1118 (2001).

Petitioner argues that this case presents an identical question of law as the question presented to this honorable Court in *Pottawattamie County v. McGhee*, Docket No. 08-1065; however, the two cases present a very different legal proposition as the issues presented in *McGhee* are far from identical. *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922, 933 (8th Cir. 2008), cert. granted, 129 S. Ct. 2002 (2009), cert. dismissed, 130 S. Ct. 1047 (2010). In *McGhee*, as prosecutors, the petitioners were arguing absolute immunity and whether a government official is entitled to immunity when he violates the due process rights of an innocent person by obtaining manufactured evidence *before filing a formal charge*. *Pottawattamie County v. McGhee*, Docket No. 08-1065; *see also Burns v. Reed*, 500 U.S. 478, 489-490 (1991). Unlike *McGhee*, this case is not about prosecutors being entitled to absolute immunity and is therefore inapposite, as the Eighth Circuit addressed the facts and issues in *McGhee* and their application solely to prosecutors. *See* Amicus Brief of the United States, *Pottawattamie County v. McGhee* (No. 08-1065), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_PetitionerAmCuUSA.pdf. Moreover,

McGhee was not convicted at trial and the prosecutors did not testify under oath as Petitioner did so here; instead *McGhee* pled guilty. *McGhee*, 547 F.3d 922, at 925 (8th Cir. 2008). In *McGhee*, the Court also pointed out that, generally, courts looks to common law tort analogies to keep Section 1983 actions within proper bounds, which explains why prosecutors may not be held liable for fabricating evidence they introduce at trial, even though police officers who fabricate evidence may be held liable under Section 1983. *See* Amicus Brief of the United States, *Pottawattamie County v. McGhee* (No. 08-1065), p.6, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_PetitionerAmCuUSA.pdf. The difference between prosecutors and officers is not only in the role they play in the investigatory phase but also their role thereafter.

Unlike Respondent's case, in *McGhee*, the fabricated evidence was never used against him. *McGhee*, 547 F.3d 922, at 925 (8th Cir. 2008). As discussed, in the present case, Petitioner told Respondent that he was going to frame him for a crime, fabricated evidence, lied under oath in order to obtain probable cause, testified against Respondent during his trials, and never disclosed the truth of his knowingly malicious act to the prosecutors, the judge, or the jury.

The Seventh Circuit determined in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), that regardless of whether the claim is for malicious prosecution, if the trial was unfair due to Constitutional violations by the police, a due process claim exists. *Newsome*

also gives us a way of cutting through the prosecutor to get to the police officer:

> If officers are not candid with prosecutors, then the prosecutors' decisions – although vital to the causal chain in a but-for sense – are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their performance with or without legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution.

Newsome v. McCabe, 256 F.3d 747, at 752 (7th Cir. 2001). Under the facts of this case, Respondent provided specific and confirming factual details regarding the alleged unlawful acts of Petitioner, including *inter alia*: 1) Petitioner stated that he planned to frame Respondent for failing to cooperate; 2) Petitioner artificially manipulated Respondent's photograph to conform to composite sketch and description of Doe's assailant by darkening the picture; and 3) Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's non-cooperation regarding an unrelated crime. Pet. App. 10a.

Moreover, a law enforcement officer such as Petitioner was constitutionally required to promptly

furnish exculpatory information in his possession to the prosecutor's office. As numerous circuits have recognized, when Petitioner knowingly and willingly ignored material, exculpatory evidence, and failed to promptly furnish such evidence to the prosecutors in Respondent's criminal case, Petitioner violated the Respondent's constitutional rights. *See Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001); *see also McMillan v. Johnson*, 101 F.3d 1363 (11th Cir. 1996); *see also Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992). Such facts were viewed by both the district court and the Fifth Circuit as constituting sufficient evidence to show that Respondent's constitutional rights were violated and that Petitioner is not entitled to qualified immunity. Pet. App. 7a-15a.

III. There Is No Split Among Circuits Regarding A Police Officer's Liability When The Police Officer Manufactures Evidence And Conceals Such Evidence From The Judge

Petitioner argues that the photographic lineup was not unduly suggestive, but fails to recognize that significant evidence presented in this matter indicates otherwise. Evidence relied on by both the district court and the Fifth Circuit showed that Petitioner framed Respondent as retaliation for Respondent's failure to cooperate with him in an unrelated matter. *Id.* Petitioner relies on *Wray v. City of New York*, 490 F.3d 189 (2d Cir. 2007), in which the Second Circuit found the liability of a police officer is cut off when

superseding acts by the judge and prosecutor act to break the causal chain of causation between the officer's acts and a violation of an individual's constitutional rights. *See Wray*, 490 F.3d 189, at 193 (2d Cir. 2007). However, in *Wray*, the court was presented with facts that focused merely on suggestive identification procedures and not the intentional acts of a police officer in fabricating evidence and deliberately concealing such a fabrication to the court. *See generally, Wray*, 490 F.3d 189 (2d Cir. 2007). Unlike the facts reviewed by the Second Circuit in *Wray*, Petitioner fabricated evidence and lied under oath by both signing a probable cause affidavit and testifying three times during the Respondent's trial.

Further, Petitioner cites and relies on a case that that actually supports Respondent's position. In citing *Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004), Petitioner incorrectly argues that a police officer's liability is cut off when an independent judge rules on the evidence and such evidence is admitted into the record. Pet. 32-36. This argument is invalid; *Egervary* is clear that the causal chain is cut *only* when the police officer presents the judge with "all the facts." *Egervary*, 366 F.3d 238, 247 (3d Cir. 2004). The Court states:

> To sum up, we adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures *but reaches an erroneous*

> *conclusion because he or she is misled in some manner as to the relevant facts*, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions.

Id. at 250 (emphasis added) (citing *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988) and *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001)). Contrary to Petitioner's argument, when the facts of this matter are accurately applied to the relevant caselaw, there exists no split amongst the circuits. Courts are in agreement that the causal chain is not broken when an independent intermediary rules based upon being misled due to a police officer's concealment of relevant evidence. *See id.* There is sufficient summary judgment evidence that establishes Petitioner is not entitled to qualified immunity because he mislead the prosecutor, the judge, and the jury during the Respondent's trials in order for Respondent to be convicted of a crime that he did not commit. Thus, the Fifth Circuit court has correctly concluded that Petitioner was not entitled to a qualified immunity defense.

IV. Qualified Immunity Is Well-Established Law and There Is No Reason For The Supreme Court To Visit the Issue When a Police Officer Has Intentionally Secured a False Identification That Produced a Wrongful Conviction

There is no dispute amongst the circuit courts that all police officers are required and presumed to

know what the law is and to act within its bounds, and that it is not objectively reasonable for a police officer to violate a person's constitutional rights unless there are exceptional circumstances present. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988). Exculpatory evidence is evidence, which tends to suggest the innocence of a person suspected of or charged with a crime. It includes evidence, which tends to prove that a defendant in a criminal proceeding did not commit the crime, evidence which suggests that the crime might have been committed by someone else, and evidence which might be used to impeach witnesses who would testify against the person accused. A defendant has a constitutional right in a criminal case to be furnished with material exculpatory evidence in the hands of the prosecution and the police. Exculpatory evidence is "material" when it would undermine confidence in a conclusion that the defendant was guilty of the crime. *Brady v. Maryland*, 373 U.S. 88 (1963); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). A law enforcement officer is constitutionally required to promptly furnish material exculpatory evidence in his possession to the prosecutor's office. If it is found that an officer knowingly and willfully ignored material exculpatory evidence and failed to promptly furnish it to the prosecutor in the criminal case against the plaintiff, then it should also be found that the officer violated the plaintiff's constitutional rights. *Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001); *McMillian v. Johnson*, 101 F.3d 1363 (11th Cir. 1996); *Sanders v. English*, 950

F.2d 1152 (5th Cir. 1992) (rejected by *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336 (2000)); *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir. 1999); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988).

Further, a defendant in a civil rights case is not entitled to any immunity if he or she gave false information to a prosecutor on which the prosecutor based his or her charge against the plaintiff. *Young v. Biggers*, 938 F.2d 565, 570 (5th Cir. 1991). Any reasonable state actor employed in a capacity, which embraces law enforcement, would surely realize that misrepresenting or concealing facts to judges or prosecutors is a violation of guaranteed rights of the accused under the United States Constitution. *See Doe v. Louisiana*, 974 F.2d 39 (5th Cir. 1992). Moreover, qualified immunity is defeated if the official took the action complained of with malicious intention to cause a deprivation of rights, or the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991). Where a government official could be expected to know that certain conduct would violate constitutional rights, in such an instance, he may not claim the defense of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The significant evidence before this Honorable Court establishes that Petitioner is not entitled to qualified immunity. As both the district court and the Fifth Circuit have recognized, the significant evidence present in this matter raises questions of material

fact regarding Petitioner's deliberate failure to provide exculpatory information to the prosecutors office, efforts to secure a false identification, as well as Petitioner's furnishing of false information to the prosecutor, the judge, and the jury in this matter. Pet. App. 10a-14a. As such, Petitioner must not be allowed to assume the benefit of qualified immunity.

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied because Petitioner has both failed to put forth reliable authority that is analogous with the facts of the case at bar and failed to show the existence of a split between circuits on any applicable issue of law. Because Petitioner has not put forth an issue that has not already been decided, he has failed to meet the substantial question requirement and therefore should be denied his Petition for Writ of Certiorari.

Respectfully submitted,

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In the
Supreme Court of the United States

FRED CURTIS,

Petitioner,

v.

DONALD WAYNE GOOD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent's Brief establishes that the questions presented by Petitioner should be reviewed by this Court. Specifically, review is warranted in regard to whether an allegation of evidence fabrication or manipulation sounds in substantive or procedural due process and whether a police officer may be held liable for the presentation at trial of constitutionally infirm evidence which was previously held by a reviewing judicial intermediary to satisfy all constitutional requirements.

Respondent does not dispute that splits exist among the Circuits regarding the questions presented in the Petition. To the contrary, he simply ignores the divergent authorities and takes the tact of asserting that, despite said conflicts, certiorari should be denied because this case does not present the appropriate factual background to address same. Resp. Brief at 12-18. However, Respondent's contention is not based on his actual due process claim, but upon other allegations unrelated to the questions presented to this Court. In any event, despite his protestations to the contrary, Respondent's brief establishes that certiorari should be granted because, in opposing same, he has implicated the same important federal questions which were at issue in *Pottawattamie County v. McGhee*. Sup. Ct. R. 10.

Respondent has the burden to show that a state action deprived him of a "specific constitutional guarantee" in order to recover under 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693, 700 (1976). However, he never attempts to identify the "specific constitutional guarantee" allegedly violated by Petitioner, i.e., either

the substantive or procedural protection of the Due Process Clause. Indeed, Respondent makes no mention of procedural or substantive due process whatsoever and never addresses the very point at issue: whether he must demonstrate a real and palpable harm to the fairness of his underlying criminal trial in order to state a viable claim for a violation of his due process rights. Stated another way, the distinction is between whether the creation of the evidence itself is a constitutional harm or whether § 1983 provides relief only where the use of that evidence has resulted in constitutional harm to the trial itself. While this Court has previously rejected the existence of a substantive due process claim when a plaintiff asserted that he was "subjected to criminal charges by an affirmative, deliberative act of a state official[,]" the Respondent essentially seeks to repackage such a claim and, instead of referring to it as "malicious prosecution," portray the "deliberative act of a state official" as the constitutional tort of being "framed," with no focus on the actual impact that such act had on the fairness of the accused's trial. *Albright v. Oliver*, 510 U.S. 266, 314 (1994) (Stevens, J., dissenting); *see Heck v. Humphrey*, 512 U.S. 477, 479, 484 (1994) (claims police and prosecutors knowingly destroyed exculpatory evidence and "caused an illegal and unlawful voice identification procedure" to be used at trial have their "closest analogy" to malicious prosecution).

Further, Respondent does not seriously dispute that the Second and Third Circuits have adopted a standard governing the recognition of superceding causation in § 1983 cases distinct from that utilized in the decision below. In fact, it may largely be the result of the aforementioned split in due process authority that differing causation standards have begun to

emerge in cases where trial proceedings are a key component of the alleged violation.

Simply put, Respondent's arguments against review have no merit for the reasons hereinafter discussed.

A. Respondent's Distortions Of The Record Cannot Reconcile The Split Among The Circuits Identified by Petitioner Or Their Direct Applicability To The Respondent's Claim

Respondent's due process claim is based upon his allegation that Petitioner framed him "by manipulating a photo for a photo lineup to produce a false identification from an eyewitness[.]" Pet. App. 7a. As a result, Petitioner addressed the split that exists among the circuits regarding due process claims premised on the fabrication or manipulation of evidence. Petition at 12-29. However, even though it is undisputed that the Respondent's claim is based upon the alleged photo manipulation, he makes repeated references to other wrongs allegedly committed by Petitioner: allegations of Fourth Amendment violations, allegations of *Brady* violations, and allegations which, while less than celebratory, do not implicate a constitutional harm at all. Resp. Brief at 7, 8-9, 10, 14, 15-16, 17, 19; *contra Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort."). All of these issues, however, are irrelevant to the narrow questions presented to this Court for

certiorari.[1] As a result, regardless of the spurious allegations repeatedly made by Respondent, the key question remains: whether a violation of the Respondent's due process rights occurred if he nevertheless received a fair trial?[2] The answer to this question varies from circuit to circuit, and thus merits review by this Court.

B. Respondent Incorrectly Contends That His Due Process Rights Were Necessarily Violated

Apparently unwilling to directly address whether his claim implicates substantive or procedural due process, Respondent argues that this Court should approve the implicit substantive due process violation adopted in the decision below. *See* Resp. Brief at 8-16. Specifically, he contends that his allegation that Petitioner darkened his photograph which was used in a photographic lineup is a *de facto* violation of his right to receive a fair trial regardless of whether that alleged act actually resulted in the creation of evidence which failed the applicable constitutional test (i.e., made his trial constitutionally infirm). *See* Resp. Brief

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[1] The validity of these other claims, including whether they were previously asserted, may be addressed by the lower courts after this Court's disposition of the questions presented herein.

[2] Respondent makes several allegations that Petitioner gave false testimony during his criminal trials. *See, e.g.*, Resp. Brief at 9, 10, 11, 14, 17. However, Petitioner's trial testimony is in the summary judgment record and establishes that he was never questioned in any trial about the appearance of the photographic lineup. To the contrary, the lineup was admitted at trial without objection through the testimony of the victim. In any event, Petitioner has absolute immunity relating to his trial testimony. *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983).

at 11. Such a standard simply adopts a substantive due process test without expressly identifying it as such, as doing so would openly admit the circuit split that Petitioner has accurately identified.

Tasked with trying to downplay and distinguish the circuit split, Respondent raises various attacks, none of which reconcile the Ninth and Seventh Circuit formulations, *nor* the distinct *effect* that the application of either test would have upon the viability of his claims. *Inter alia*, the Respondent claims that:

> (1) the facts in this case are distinguishable because he alleges that Petitioner *acted* knowingly and intentionally. *See* Resp. Brief at 9-10. *But see McCann v. Mangialardi*, 337 F.3d 782, 786 (7th Cir. 2003) (rejecting a claim alleging the "deprivation of liberty from a prosecution and a contrived conviction ... *deliberately obtained* from the use of *false evidence*" because such a "claim is, in essence, one for malicious prosecution" rather than a viable claim sounding in substantive due process.) (emphasis added);[3]
>
> (2) some of the cases cited by Petitioner are inapposite because they are not § 1983 cases addressing assertions of qualified immunity.[4]

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[3] Further, such a standard risks reviving the subjective component of qualified immunity rejected by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982).

[4] *Inter alia*, Respondent cites *Alexander* as a case which does not address qualified immunity. Resp. Brief at 12-13. However, while the words "qualified immunity" do not appear in *Alexander*, it affirms dismissal because the plaintiff "failed to identify evidence

See Resp. Brief at 12-13. *But see McMillian v. Johnson*, 88 F.3d 1554, 1570 n.22 (11th Cir. 1996) ("[t]o the extent that Tate argues that we must look solely to § 1983 cases to discover clearly established law, his argument is frivolous. . . . Constitutional standards [do not] vary depending on whether a constitutional violation is alleged in a criminal proceeding or a § 1983 action"); and

(3) Respondent's underlying criminal trial was unfair due to an alleged *Brady* violation committed by Petitioner. However, neither the district court nor the decision below ever identified a *Brady* claim in this case, and *Brady* is unrelated to the specific claim at issue in the question presented to the Court. *See* Pet. App. 1a-42a; Resp. Brief at 4, 14-16;[5] Pet. App. 7a (identifying Respondent's claim of evidence manipulation).

Ultimately, the split between the Seventh and Ninth Circuit formulations, which mirrors the question presented herein, is whether a plaintiff situated as the Respondent herein has the burden of establishing that he suffered an independent constitutional harm during his criminal trial upon which his § 1983 claim is based. In *McGhee*, which Respondent makes a futile attempt to distinguish, the plaintiffs' underlying convictions had been reversed due to a *Brady* violation. *McGhee v. Pottawattamie*

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of any constitutional violation." *Alexander v. City of South Bend*, 433 F.3d 550, 555 (7th Cir. 2006). This is a precise element that must be satisfied to overcome qualified immunity. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009).

[5] *See supra* note 1.

County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008), *cert. granted* 129 S. Ct. 2002 (2009), *cert. dismissed* 130 S. Ct. 1047 (2010). In other words, by the time those plaintiffs brought suit under §1983, it was established that they had received a constitutionally unfair trial. *Id.* While issues of absolute prosecutorial immunity were implicated, the Eighth Circuit decided the case on *qualified immunity* principals. *Id.* at 932. The legal dispute, therefore, focused on what constitutional rights were violated based upon allegations that evidence fabricated by prosecutors had resulted in an unfair trial.[6] *Id.* On certiorari, the issue of whether the fabrication of evidence constitutes an independent substantive due process claim *was* at issue, as the respondents argued, *inter alia*, for the recognition of such a claim in order to circumvent any assertion of absolute immunity by the prosecutors. Merits Brief of Respondents, *Pottawattamie County v. McGhee*, (No. 08-1065), p. 24, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_Respondent.pdf. Thus, while the Court's resolution of this point in *McGhee* would have implicated additional issues of absolute prosecutorial immunity, the underlying dispute regarding the very existence of such a constitutional claim at all was presented and argued to this Court. As a result, the underlying *legal* issue in *McGhee* was the same as it is here because absolute prosecutorial immunity could have been implicated only if the due process harm at issue occurred at trial, i.e. sounded in procedural, rather than substantive, due process.

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[6] Of course, causation would remain an element of § 1983 liability.

This case, like *Alexander* and *McCann*, differs factually from *McGhee* because there has been no pre-suit finding of a constitutionally unfair trial. For example, *Alexander* dealt with a plaintiff exonerated by DNA evidence, just as Respondent was *Alexander*, 433 F.3d at 552. When Alexander brought claims virtually identical to Respondent's, the Seventh Circuit held that he had the burden of establishing that his trial had, in fact, been unfair in order to prove his due process claim–something unnecessary in *McGhee* since constitutional harm at trial had already been established and, in any event, the Eighth Circuit recognized a substantive due process claim. *Alexander*, 433 F.3d at 555; *McGhee*, 547 F.3d at 925; *see also Wray v. City of New York*, 490 F.3d 189 (2d Cir. 2007) (constitutional harm established in underlying habeas corpus proceeding); *McCann*, 377 F.3d at 788 (plaintiff was unable to provide any evidence that alleged *Brady* violation occurred and harmed his criminal trial); *cf. Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring). Here, just as in *Alexander*, no court either in this case or the underlying legal proceedings has ever found that Respondent's criminal trial was constitutionally unfair and, as a result, that fact is not pre-established for the purpose of Respondent's claim. *See Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004).

Faced with this procedural history, Respondent seeks to avoid the requirement that Petitioner caused his *trial* to be unfair because such a requirement would implicate the same test the *Alexander* court found unsatisfied: this Court's *Brathwaite* test governing whether the use of a lineup procedure at trial violates an accused's due process right to a fair

trial. *Alexander*, 433 F.3d at 555. The only way to do this is to argue in favor of a substantive due process claim, as recognized by the Ninth Circuit in *Devereaux v. Abbey* and implicitly adopted in the decision below. 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). However, the Seventh Circuit formulation has expressly rejected such a constitutional claim. *McCann*, 337 F.3d at 786; *Alexander*, 433 F.3d at 555; *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001).

This Court's precedents have strongly resisted transforming substantive due process into a "font of tort law." *Paul*, 424 U.S. at 701. Further, this Court recognized in *Albright* that the due process protections described by *Mooney* were procedural in nature. *Albright*, 510 U.S. at 273 n.6 (plurality opinion); *Albright*, 510 U.S. at 283 (Kennedy, J.). Respondent cites no precedent of this Court which would indicate the contrary. As a result, the precedents of this Court strongly suggest that the procedural due process component of the Fourteenth Amendment protects an accused from the fabrication of evidence. Nonetheless, circuit courts are irreconcilably split over how to properly determine whether a plaintiff with a claim such as Respondent's has "ma[d]e out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816. As a result, certiorari should be granted to resolve this continuing dispute which subjects police officers and other government officials (including prosecutors) in different circuits to different standards of potential civil liability.

C. Respondent Incorrectly Asserts That No Split Exists Among the Circuits Regarding An Officer's Liability After A Judicial Intermediary Determines That The Evidence Presented Satisfies Constitutional Scrutiny

At the outset, Respondent incorrectly asserts that "Petitioner argues that the photographic lineup was not unduly suggestive[.]" Resp. Brief at 16. This is simply untrue. What is undisputed, however, is that the state judge in the Respondent's criminal case examined the very lineup prepared by the Petitioner and *he* held that it was not unduly suggestive. Pet. App. 44a.

While Respondent attempts to assert that no circuit split exists, he ignores the basis for the diverging paths followed by the circuit courts. Specifically, the circuit split, culminating with *Wray*, addresses when an intervening judicial act insulates a police officer from liability *despite* his alleged wrongdoing. *See Zahrey v. Coffey*, 221 F.3d 342, 352 n.8 (2d Cir. 2000). On a generalized level, the split involves the issue addressed in *Egervary v. Young* and the decision below. Specifically, despite Respondent's contentions to the contrary, *Egervary* follows the Second Circuit and adopts a causation standard which recognizes that even when a police officer was "clearly a cause" of the plaintiff's harm, the conduct of a judicial officer provided with the "appropriate facts" who nonetheless improperly applies the governing law is a superceding cause which precludes liability on the part of the police officer. 366 F.3d 238, 250-51 (3d Cir. 2004). While *Egervary* requires that the judicial officer not be misled as to "relevant facts," the Third Circuit is clear that the facts which the judicial officer must be

apprised of are those that are relevant to his application of the law. *Id.* at 250. The decision below paints with a much broader brush, refusing to recognize a superceding cause when there is "any misdirection" of the reviewing magistrate, regardless of its relevance to the magistrate's legal decision. Pet. App. 12a.

Wray is the prime example of the circuit split, as the decision below and the Second Circuit reached completely different results on identical facts. In *Wray*, the Second Circuit held that the erroneous admission of a suggestive identification by the court relieved the police officer who created the identification procedure from liability. *Wray*, 490 F.3d at 192 93, 195. The decision below reached the opposite result even though the state judge had ruled that the lineup prepared by Petitioner, assumed at summary judgment to be unduly suggestive, "was not suggestive in its composition[.]"[7] Pet. App. 44a. While Respondent argues that there is not a split among the circuits but rather a distinction grounded in his allegations that Petitioner's actions were intentional and misled the judge regarding the lineup's creation, he points to no authority whatsoever which supports his assertion that the intent of the officer who creates a lineup is relevant when a judge looking at the very same photographic lineup determines whether its appearance and composition is suggestive. Resp. Brief at 16-17. To the contrary, the relevant authority suggests the opposite. *Thiggpen v. Cory*, 804 F.2d 893,

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[7] This procedural assumption is, of course, only true for the first element of the *Brathwaite* test, not the entirety of the test. *Manson v. Brathwaite*, 432 U.S. 98, 112-14 (1977).

895 (6th Cir. 1986) ("deterrence of police misconduct is not the basic purpose for excluding identification evidence[,]" it is only "the likelihood of misidentification that violates a defendant's right to due process").

The split, then, is that the decision below would hold that a police officer must allocute all potentially nefarious motiviations regardless of relevance to the evidentiary test the court is to perform, while the Second and Third Circuits recognize a superceding cause in any instance where the "appropriate facts," in this case the very lineup at issue herein, that are relevant to the legal test performed have been presented to the reviewing judge. *Egervary*, 336 F.3d at 250; *see Wray*, 490 F.3d 189; *see Townes v. City of New York*, 176 F.3d 138, 146-47 (2d Cir. 1999). As a result, certiorari is appropriate to resolve this intercircuit dispute.

Respectfully submitted.

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